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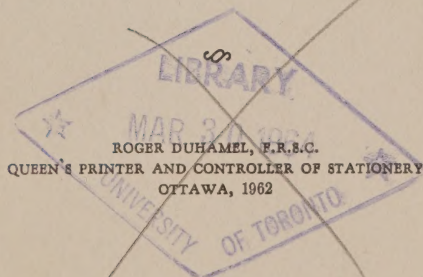
~~RESTRICTIVE TRADE PRACTICES COMMISSION~~

REPORT

Concerning the Distribution and Sale of Electric
Appliances, Electric Shavers and Accessory
Products (Sunbeam Corporation
(Canada) Limited)



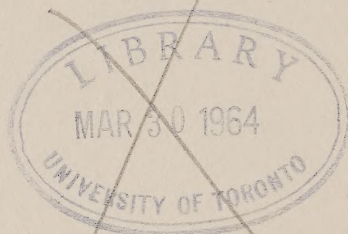
DEPARTMENT OF JUSTICE
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RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

CONCERNING THE DISTRIBUTION AND
SALE OF ELECTRIC APPLIANCES,
ELECTRIC SHAVERS AND ACCESSORY
PRODUCTS (SUNBEAM CORPORATION
(CANADA) LIMITED)

COMBINES INVESTIGATION ACT

Ottawa
1962



RESTRICTIVE TRADE PRACTICES COMMISSION

C. Rhodes Smith, Q. C., M. A., LL. B., B. C. L.
Chairman

Pierre Carignan, Q. C., M. A., LL. L.
Member

A. S. Whiteley, B. A., M. A.
Member

RESTRICTIVE TRADE PRACTICES COMMISSION

OTTAWA

October 4, 1962.

Honourable Donald M. Fleming, P.C., Q.C., M.P.,
Minister of Justice,
Ottawa.

Sir:

I have the honour to submit to you herewith the report of the Restrictive Trade Practices Commission arising out of an inquiry relating to the distribution and sale of electric appliances, electric shavers and accessory products.


The matter was brought before the Commission by the submission of a statement of the evidence obtained in the inquiry by the Director of Investigation and Research under the Combines Investigation Act and has been dealt with in accordance with the provisions of sections 18 and 19 of the Act.

Evidence and argument in regard to the Statement of Evidence were heard by the Commission at Toronto on June 20 and 21, 1962. In these proceedings Messrs. A.C. Whealy, S. F. Sommerfeld and M. E. Butler appeared for the Director of Investigation and Research, and Messrs. W.R. West, Q.C. and J.H.C. Clarry appeared on behalf of Sunbeam Corporation (Canada) Limited against which company allegations were made in the Statement of Evidence.

Yours faithfully,

(Sgd.) C. Rhodes Smith

C. Rhodes Smith
Chairman



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CONTENTS

	Page
CHAPTER I -INTRODUCTION	1
1. Reference to the Commission	1
2. Conduct of the Investigation by the Director	1
3. Hearing held by the Commission	2
4. Allegations in the Statement of Evidence . .	3
5. Position Taken by Sunbeam Corporation (Canada) Limited with Respect to Allegations	6
CHAPTER II -LEGISLATION RESPECTING RESALE PRICE MAINTENANCE	9
CHAPTER III -DISTRIBUTION POLICY OF SUNBEAM AFTER AMENDMENT OF COMBINES INVESTIGATION ACT	13
1. Development of Policy Based on Minimum Profitable Resale Price (M.P.R.P.) . .	13
2. Introduction of M.P.R.P. Programme by Sunbeam	17
CHAPTER IV -EFFORTS OF SUNBEAM TO SECURE ADOPTION OF M.P.R.P. PROGRAMME . .	24
1. Meetings of Sunbeam Distributors	24
2. Approaches by Sunbeam to Retail Dealers . .	29
CHAPTER V -APPLICATION OF M.P.R.P. PROGRAMME BY SUNBEAM	40
1. Faucher Electrique Limitee, Montreal . . .	40
2. Honest Ed's (1959) Limited, Toronto	46
CHAPTER VI -DEALER AND DISTRIBUTOR COST SURVEYS MADE BY SUNBEAM	66
CHAPTER VII -CONCLUSIONS	70

TABLES

		Page
1	Sales of Sunbeam Steam Irons (S-5) by Honest Ed's in 1960	50
2	Sales of Sunbeam Electric Shaver #555 by Honest Ed's in 1960	53
3	Sales of Sunbeam FPM Frypans by Honest Ed's in 1960	54

CHAPTER I

INTRODUCTION

1. Reference to the Commission

This inquiry was brought before the Commission by the Director of Investigation and Research under the Combines Investigation Act, submitting under date of March 7, 1962 a statement of the evidence which had been obtained in the inquiry. At the same time the Director submitted a copy of the Statement of Evidence to Sunbeam Corporation (Canada) Limited, against whom allegations were made therein. In the Statement of Evidence and in this report Sunbeam Corporation (Canada) Limited is sometimes referred to as "Sunbeam".

2. Conduct of the Investigation by the Director

As a result of several letters of complaint and supporting evidence received by the Director the investigation was begun on the initiative of the Director pursuant to section 8(b) of the Combines Investigation Act.

In the course of the investigation conducted by the Director premises of Sunbeam Corporation (Canada) Limited, located at 220 Islington Avenue in Toronto, Ontario were visited by representatives of the Director and certain documents were selected and copied and the original documents returned. All documents selected for copying were marked with code letters in the upper right hand corner to indicate the particular premises and occasion on which they were found and each sheet of every document was marked with a separate serial number in the lower right hand corner, which enables it to be distinguished from all other documents. In the Statement of Evidence and in this report the serial numbers are given in referring to a particular document.

During the investigation, the Director made application to a member of the Commission to examine witnesses under oath as provided in section 17 of the Act. The following witnesses were examined before Mr. C. Rhodes Smith, Q.C., Chairman of the Commission, in Toronto, Ontario, on April 13, 1961:

Edward Albert Jeffreys,	Vice-President, Honest Ed's (1959) Limited, Toronto, Ontario.
John Soltyssek,	Buyer and Merchandising Manager, Honest Ed's (1959) Limited, Toronto, Ontario.
David Schell Rattray,	Executive President, Masco Electric Company Limited, Toronto, Ontario.

Certain exhibits were also filed at the hearing on April 13, 1961.

3. Hearing held by the Commission

On receipt of the Statement of Evidence, the Commission, in accordance with the provisions of section 18 of the Act, by an Order dated March 14, 1962, fixed Monday, June 18, 1962 at the hour of ten o'clock in the forenoon, in the Board Room, Department of Labour, 9th Floor, Mackenzie Building, 36 Adelaide Street East, in the City of Toronto, in the Province of Ontario, as the date, time and place at which argument could be submitted by or on behalf of the Director in support of the Statement of Evidence and at which Sunbeam Corporation (Canada) Limited would be allowed full opportunity to be heard with respect to the allegations against the Company made in the Statement of Evidence. The date of the hearing was subsequently changed to June 20, 1962.

At the hearing before the Commission which was held on June 20 and 21, 1962, the following appearances were entered:

A. C. Whealy)	
S. F. Sommerfeld)	- for Director of Investigation
M. E. Butler)	and Research
W. R. West, Q.C.)	- for Sunbeam Corporation (Canada)
J. H. C. Clarry)	Limited

Before argument was heard by the Commission, certain exhibits numbered H-1 to H-15 were received and the following witnesses were examined:

Edward Albert Jeffreys	Vice-President, Honest Ed's (1959) Limited
Edwin B. Chown	Executive Partner, Woods, Gordon & Co.
John J. MacIntyre	Senior Clerk, Sales Department, Sunbeam Corporation (Canada) Limited.

In this report reference to evidence given in the investigation conducted by the Director will be made as (Evidence, p. . . .)and reference to proceedings before the Commission as (Hearing, p. . . .).

4. Allegations in the Statement of Evidence

The concluding chapter of the Statement of Evidence contains a summary and allegations. The latter part of the summary reviews the relations of Sunbeam with three retail firms and comments on certain surveys sponsored or undertaken by Sunbeam to obtain costs of operation of merchants handling Sunbeam products. This part of the summary is not reproduced here but the first part and the allegations of the Director are given below. In these extracts and elsewhere in the Statement of Evidence the designation "M.P.R.P." is used. This stands for "Minimum Profitable Resale Price", a term which was used by Sunbeam in its dealer price lists.

"Summary

125. Sunbeam is a private company, incorporated in Canada, and is a wholly-owned subsidiary of Sunbeam Corporation of Chicago, U.S.A. Sunbeam is in the business of manufacturing, importing and selling a variety of products which may be generally described as small appliances, electric shavers and other electrically powered implements. With minor exceptions, these products are manufactured and sold under the brand name 'Sunbeam' which is a registered trade mark owned in Canada by Sunbeam.

126. By circular letter, dated September 1, 1960, Sunbeam

notified its franchised distributors that it would consider as probable loss-leading all sales of Sunbeam products to retail dealers at prices less than those referred to in the circular letter and accompanying price sheets; the letter implied that Sunbeam would take action to prevent any distributor from selling at less than the prices shown on the accompanying price sheets.

127. By circular letter, dated September 14, 1960, Sunbeam notified retailers of Sunbeam products that it considered a retailer to be loss-leading Sunbeam products if the retailer made a practice of selling at a gross margin less than the retailer's average cost of doing business plus a reasonable profit. Sunbeam also stated in this circular letter that, as a result of Sunbeam's own conclusions, the minimum price at which each Sunbeam product could be profitably sold had been calculated and was shown on the accompanying price sheets. The letter concluded by saying that the offering of Sunbeam products for sale at less than the prices specified in the price sheets would be investigated as cases of loss-leading, and that retailers found to be loss-leading would be refused supplies, and that Sunbeam would counsel its distributors to refuse supplies. Approximately 21,000 circular letters to retail dealers were distributed by Sunbeam.

128. Effective January 22, 1961 Sunbeam, having replaced certain products with new products, distributed new distributor and retail dealer price sheets on which was printed a copy of the September 14, 1960 letter to retail dealers.

129. Effective March 11, 1961, Sunbeam, having again replaced certain products, distributed new distributor and dealer price sheets, on which was reproduced a copy of the September 14, 1960 letter to retail dealers.

130. Effective June 17, 1961, Sunbeam distributed new price sheets for certain products to direct buying retail customers. These price lists did not have the September 14, 1960 letter to retail dealers reproduced on them.

131. The evidence from correspondence and memoranda between officials and employees of Sunbeam shows that the object of the M. P. R. P. system, as outlined in the Distributor and Dealer circulars, and on subsequent price revisions, was to prevent Sunbeam products being offered for sale or sold at prices less than the minimum prices specified by Sunbeam. Sunbeam sought to accomplish its object by stating in advance that

it would, prima facie at least, consider distributor and dealer prices which were less than those specified to be loss-leading, and by reference to section 34(5) of the Act, implying that it would refuse supplies (or insist that its distributors refuse supplies) to those outlets which failed to observe these minimum prices. The essence of the M. P. R. P. policy was, therefore, to induce or attempt to induce its distributors and dealers by threats and strong persuasion to refrain from selling Sunbeam products for lower prices than those specified by Sunbeam.

132. In pursuance of the M. P. R. P. system, Sunbeam held a number of regional meetings of its distributors, during the early part of September, 1960, at which it was made clear to the distributors that Sunbeam would not permit any distributor to continue to sell to any retailer whom Sunbeam decided had sold at less than the M. P. R. P. levels, on the basis that such retailer would be loss-leading. Distributors who failed to obey Sunbeam's 'counselling' would be refused supplies themselves. The Evidence shows that, for the most part, the distributors were in agreement with these instructions by Sunbeam and agreed independently of the M. P. R. P. system to adopt common freight charges, cash discount allowances, and to adopt the M. P. R. P. system. These distributor meetings were held in at least nine cities across Canada. The evidence shows that one distributor in the Province of Quebec agreed with his competitors to withdraw advertisements of Sunbeam products less than the M. P. R. P. and thenceforth to sell through their associated retail outlets at not less than the M. P. R. P.

133. During September, October and November, 1960, the evidence shows that Sunbeam salesmen, upon instructions from their superiors visited retail outlets in their territories for the purpose of insisting that prices of Sunbeam products be increased to at least the M. P. R. P. level, employing the arguments and policy set out in the Distributor and Dealer Circulars, i.e., that retail prices less than the M. P. R. P. would be considered by Sunbeam to be loss-leading and supplies to retailers selling at less than such prices would be refused. The correspondence between employees and officers of Sunbeam clearly demonstrates that the purpose of increasing prices in retail stores was not to prevent loss-leading, but to establish and maintain minimum retail prices for Sunbeam products.

134. The evidence establishes that Sunbeam regarded the advertising and sale of its products, by a particular outlet, at less than the M. P. R. P. levels as a threat to the success of its M. P. R. P. system rather than as a case of loss-leading.

. . .

. . .

Allegations

148. It is alleged that commencing on or about September 1, 1960 and continuously until at least June 23, 1961, Sunbeam Corporation (Canada) Limited, being a dealer within the meaning of section 34 of the Combines Investigation Act, directly or indirectly by agreement, threat, promise or other means, required or induced or attempted to require or induce, distributors of Sunbeam products to resell such products at

- (a) a price not less than a minimum price specified by Sunbeam or established by agreement; or
- (b) at a markup not less than a minimum markup specified by Sunbeam or established by agreement; or
- (c) at a discount not greater than a maximum discount specified by Sunbeam or established by agreement.

149. It is further alleged that commencing on or about September 14, 1960 and continuously until at least June 23, 1961, Sunbeam Corporation (Canada) Limited, being a dealer within the meaning of section 34 of the Combines Investigation Act, directly or indirectly by agreement, threat, promise or other means, required or induced, or attempted to require or induce, retailers of Sunbeam products to resell such products at a price not less than a minimum price specified by Sunbeam or established by agreement."

5. Position Taken by Sunbeam Corporation (Canada)
Limited with Respect to Allegations

The position taken with respect to the allegations made by the Director was set forth on behalf of Sunbeam by Mr. J. H. C. Clarry in an opening statement and in argument. The principal submissions made may be summarized as follows:

1. The issue by Sunbeam in September 1960 of a schedule of prices under the heading, "Minimum Profitable Resale Price" and the letters to distributors and dealers sent out at that time did not constitute a contravention of section 34 of the Combines Investigation Act and were reasonable steps for a manufacturer to take, in view of the passing immediately before that time of the amendment adding subsection 5 to section 34. [Subsection 5 provides certain defences for the refusal or counselling the refusal to sell or supply].

2. The conduct of Sunbeam subsequently with respect to the Minimum Profitable Resale Price programme was consistent with the position outlined above and was in no way improper.

3. It was submitted that the position taken by the Director that the defences provided in subsection 5 of section 34 are not applicable when an offence is alleged under subsection 2 of section 34 is not well founded. Subsection 5 refers to a "prosecution under this section", without qualification, and, therefore, if part of the evidence relied upon is evidence of refusal to sell or counselling refusal to sell the accused is entitled to the benefit of subsection 5 whether an offence is alleged under section 34(2) or 34(3). Since the Director has submitted that section 34(5) is not applicable and that his allegations are based on grounds other than refusal to sell or counselling refusal to sell, no argument would be made on behalf of Sunbeam relying upon the defences provided in section 34(5). At the same time it was submitted on behalf of Sunbeam that the Director, impliedly, says that no unfavourable inference is to be drawn from the cutting off of supply from certain retailers. Counsel therefore asked that the Commission not draw any inference unfavourable to Sunbeam from such actions.

4. The letters sent out by Sunbeam to dealers made clear that it is illegal for a manufacturer to maintain resale prices and that was the position that Sunbeam maintained throughout the period covered by the Statement of Evidence. The letters indicated Sunbeam's intention which was to take advantage of the amendment to section 34 passed in August, 1960, which it was entitled to do.

5. It was preferable for Sunbeam to set out its policy in a letter to dealers rather than merely to come along and cut off a dealer engaged in loss-leading practices.

6. The position Sunbeam was trying to establish was that selling prices below the Minimum Profitable Resale Price level would be the danger signal to the company and it would feel called upon to investigate prices below this level, and determine whether in fact the sale was a case of loss-leading. It was Sunbeam's opinion that goods have to be sold at a gross margin which includes the cost of doing business, plus a reasonable profit.

7. It was denied that the Minimum Profitable Resale Price programme of Sunbeam was to set up some scheme of maintaining a minimum price as alleged by the Director. Sunbeam's objective was to avoid loss-leading of its products and its ultimate remedy was to cut off a dealer or to counsel a distributor to cut off a dealer who was engaged in the practice of loss-leading, if the facts justified such action. In order to avoid the necessity of doing this Sunbeam used its Minimum Profitable Resale Price programme to state its position to the dealers.

8. It was submitted that the issue by Sunbeam of Minimum Profitable Resale Prices, the distributor's circular and the dealer's circular did not constitute directly or indirectly the requiring or the inducing or attempting to require or induce distributors of Sunbeam products to resell such products at prices not less than the minimum, nor a similar inducement or attempt to require or induce retailers to resell in that manner.

CHAPTER II

LEGISLATION RESPECTING RESALE PRICE MAINTENANCE

In October 1951 the Committee to Study Combines Legislation, generally known as the MacQuarrie Committee, made an interim report on the practice of resale price maintenance. This report held that the practice was restrictive and did not promote public welfare and the Committee recommended that "it should be made an offence for a manufacturer or other supplier:

1. To recommend or prescribe minimum resale prices for his products;
2. To refuse to sell, to withdraw a franchise or to take any other form of action as a means of enforcing minimum resale prices."

Following the recommendations of the MacQuarrie Committee Parliament enacted legislation which now forms part of section 34 of the Combines Investigation Act, which came into force on December 29, 1951. The amendment then enacted forbids a manufacturer or other supplier from requiring or inducing or attempting to require or induce, directly or indirectly, any other person to resell an article at a specified price or at not less than a minimum price, and makes it unlawful for a supplier to refuse to sell or supply an article or commodity to any other person for the reason that such person has resold or offered to resell the article or commodity at less than a price specified by the supplier or has refused to resell or offer for resale the commodity at not less than a specified price.

The MacQuarrie Committee had received representations that abolition of resale price maintenance would open the door to widespread loss-leader practices. Although the Committee considered that the loss-leader device did not promote general welfare and was not compatible with the public interest, it did not believe that the loss-leader practice constituted any immediate danger. In its final report, submitted in March, 1952, the MacQuarrie Committee recommended that the loss-leader practice should be studied under the Combines Investigation Act "with a view to determining its prevalence and its effects

and to recommending to the Minister suitable amendment, if necessary, of the Act."

Such a study was undertaken by the Director of Investigation and Research soon after the reorganization in the administration of the Combines Investigation Act, and related statutes which had been recommended by the MacQuarrie Committee and which came into effect on November 1, 1952. The results of the Director's inquiries were submitted in a volume called the Green Book to the Commission in February, 1954, and the Commission subsequently held hearings at various points across Canada to gather further information and hear representations. The Commission's report on loss-leader selling was made in March, 1955. In the opinion of the Commission, the evidence obtained indicated that at least up to that time instances which could be considered as suggesting the possibility of grave loss-leading had been quite exceptional and sporadic in nature. The Commission found no proof that the abolition of resale price maintenance had led to practices or conditions such as the MacQuarrie Committee had in mind when it spoke of loss-leaders as a monopolistic device detrimental to the public interest. No recommendations for legislative amendment were made in the Commission's report.

Section 34 of the Combines Investigation Act dealing with resale price maintenance remained unchanged until 1960, when the section was amended to provide that where a supplier has been charged with resale price maintenance and it is proved that he refused or counselled the refusal to supply another person, no inference unfavourable to the accused shall be drawn from that evidence if he satisfies the court that he had reasonable cause to believe and did believe that that person was making a practice of employing certain methods, including the use of loss-leaders, as defined, in the case of the supplier's product. The amendment to the Act received Royal Assent on August 10, 1960. Section 34 as amended reads as follows:

"34. (1) In this section 'dealer' means a person engaged in the business of manufacturing or supplying or selling any article or commodity.

(2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity

(a) at a price specified by the dealer or established by agreement,

(b) at a price not less than a minimum price specified by the dealer or established by agreement,

- (c) at a markup or discount specified by the dealer or established by agreement,
- (d) at a markup not less than a minimum markup specified by the dealer or established by agreement, or
- (e) at a discount not greater than a maximum discount specified by the dealer or established by agreement,

whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.

(3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person

- (a) has refused to resell or to offer for resale the article or commodity
 - (i) at a price specified by the dealer or established by agreement,
 - (ii) at a price not less than a minimum price specified by the dealer or established by agreement,
 - (iii) at a markup or discount specified by the dealer or established by agreement,
 - (iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or
 - (v) at a discount not greater than a maximum discount specified by the dealer or established by agreement; or
- (b) has resold or offered to resell the article or commodity
 - (i) at a price less than a price or minimum price specified by the dealer or established by agreement,
 - (ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or
 - (iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

(4) Every person who violates subsection (2) or (3) is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both. 1951 (2nd Sess.), c. 30, s. 1; 1952, c. 39, s. 4.

(5) Where, in a prosecution under this section, it is proved that the person charged refused or counselled the refusal to sell or supply an article to any other person, no inference unfavourable to the person charged shall be drawn from such evidence if he satisfies the court that he and any one upon whose report he depended had reasonable cause to believe and did believe

- (a) that the other person was making a practice of using articles supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;
- (b) that the other person was making a practice of using articles supplied by the person charged not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles;
- (c) that the other person was making a practice of engaging in misleading advertising in respect of articles supplied by the person charged; or
- (d) that the other person made a practice of not providing the level of servicing that purchasers of such articles might reasonably expect from such other person."

CHAPTER III

DISTRIBUTION POLICY OF SUNBEAM AFTER AMENDMENT OF COMBINES INVESTIGATION ACT

1. Development of Policy Based on Minimum Profitable Resale Price (M. P. R. P.)

Sunbeam is incorporated as a private company under the Companies Act (Canada) with its head office at 220 Islington Avenue, Toronto, Ontario. It is a wholly-owned subsidiary of Sunbeam Corporation of Chicago, Illinois, United States of America.

Sunbeam is in the business of manufacturing, importing and selling electrically operated appliances such as razors, portable kitchen appliances, vacuum cleaners, floor polishers, irons, heaters, blankets, hair dryers and similar products. Sunbeam is the sole source of supply in Canada of branded Sunbeam products and owns the brand name or trademark "Sunbeam" in Canada.

Sunbeam sells these products to enfranchised distributor and wholesale firms, who in turn re-sell to retail outlets, which are referred to as dealers. Sunbeam also sells direct to some retail firms which are sometimes described as "Direct Buying Retailers". The distributor and wholesale outlets are not restricted to selling Sunbeam products only, and generally these firms also deal in products of Sunbeam's competitors. The retail dealers also generally handle the products of several competing manufacturers. Included among retail outlets for Sunbeam products are electrical appliance, hardware, jewellery, drug and department stores and so-called discount houses.

Although, as the evidence shows, the amendment made in August, 1960 to section 34 of the Combines Investigation Act, dealing with resale price maintenance, did not go as far as Sunbeam would have liked, the company welcomed the change in the legislation and set about developing a new policy of distribution. At this time Mr. E. F. Bond was Executive Vice-President and senior officer of

Sunbeam in Canada, Mr. L. F. Fitzpatrick Jr. was Vice-President and General Sales Manager and Mr. J. C. Hall was Assistant General Sales Manager. During the spring of 1961, Mr. Fitzpatrick Jr. ceased to be an official of Sunbeam. He was succeeded by Mr. J. C. Hall, who subsequently became Vice-President and General Sales Manager.

After the bill to amend the Combines Act had been introduced, Sunbeam began to explore means of securing information as to average profits of electric appliance dealers. These inquiries were mentioned by Mr. E. F. Bond in a letter of August 4, 1960 to Mr. L. W. Prestin then President of Sunbeam Corporation in the United States. It might be mentioned that the amendments to the Combines Act were passed by the House of Commons on August 1, 1960. Mr. Bond's letter was as follows:

"Attached is an article which appeared in THE GLOBE AND MAIL on Tuesday, August 2, which I know you will enjoy reading as it tells about Bill C-58 being passed by the House. As you know, it still has to be cleared by the Senate but it is our understanding that this is just a formality and there is no question about it going through.

In the meantime we are making certain investigations with some of the local economists and statisticians to try and obtain as much information as we can about average profits by most electric appliance retailers in an effort to have some basis on which we can justify our refusal to sell these fellows who are loss-leading. All we have to have is reason to believe they are doing this and any accurate statistical information that we have can be used as a basis.

We are also building our files on some of these people which will definitely indicate that they are making a practice of selling our products as loss-leaders."

(Serial 688)

A company memorandum to all Sunbeam salesmen dated August 23, 1960 contained the following:

". . .

As stated to you clearly, this we consider a major step forward since, at long last, the Government is on record as indicating that loss-leading is not in the public interest. Please

understand that it does not say that it is illegal to loss-leader. It is equally important that the trade understand completely that this revision is not intended to be used as a means to maintain prices.

As discussed thoroughly, it is our intention to develop more orderly marketing of our Appliances as a result of this law. It is important in each area that each of you appraise your own problems and keep us informed. It is recommended that you keep accurate files of all dealer advertisements showing prices below suggested dealer cost. Such files may provide excellent evidence at the right time when it may be necessary to take action against the dealer who, in our estimation, is loss-leadering. We will be interested in your recommendations with regard to particular accounts in your territory whom you suspect of loss-leadering, and at such time, it is important that you provide us with as much evidence as possible.

It is your privilege to counsel dealers with regard to making a profit in selling Sunbeam. If, for example, an advertisement might appear at extremely low prices, your discussion with the dealer involved would express concern about his 'use' of Sunbeam Appliances. It is recommended that you record such an interview and, in particular, note conclusions that the dealer might draw. If the dealer involved persists in this activity, then your full and immediate report must be submitted."

(Serials 684-685)

The distribution policy developed by Sunbeam was described, as follows, in a letter of September 13, 1960 by Mr. E. F. Bond to the President of Sunbeam Corporation in Chicago:

" . . .

We have now decided on a definite course of action with the advice and consent of our attorneys. . . . Naturally our programme is not being presented as elaborately as GE's due to lack of preparation and a definite decision on what we could do.

We have held and will hold distributor meetings in all major marketing centres throughout Canada for the purpose of explaining our programme. Actually it is similar to GE's in that we will do the following two things:

- (1) Establish maximum discounts allowed by distributors for quantity purchases by dealers (5% on any assortment of 12)

- (2) Establish minimum profitable resale prices for dealers.

A letter dated September 1, 1960 (copy attached) stating our programme was handed to the distributors at these meetings or if a distributor was not in attendance it was mailed to him.

We also gave the distributor a copy of a letter going forward to dealers on Wednesday, September 14, (copy attached) which outlines our policy with respect to 'loss-leader' selling and our interpretation of the new legislation which provides that shipments may be withheld from any person who, in our opinion, makes a practice of:

- (1) Loss-leading our products.
- (2) Engaging in misleading advertising of our products.
- (3) Not providing service that purchasers might reasonably expect.

Included with the dealer letter is a new Dealer Price List (copy attached) on which is shown what we consider to be the minimum profitable resale price for the various products listed.

The reason for our action with respect to distributors is that it is the opinion of our attorneys that they too can be guilty of 'loss-leading'. We hope to support our position, in the event that we find it necessary to cut off a distributor for this reason, by obtaining sufficient data from such organizations as Canadian Electrical Distributors' Association, Canadian Wholesale Hardware Association and others, which will enable us to determine what the average gross margins in the wholesale trade are, as well as their other costs of doing business.

In order to support our reasons for believing retailers are selling our products for the purpose of advertising and not for the purpose of making a profit, we are sending out a mailing to approximately one hundred efficient retailers throughout Canada with forms they are to fill in and return directly to our auditing firm, Peat, Marwick, Mitchell & Company. The data we ask for will be taken from their year-end financial statements and will give us Sales, Cost of Sales, Gross Profit, SG & A and Net Profit.

With this information our auditors will compile a composite report giving us national averages of efficient retailers. Since we will know the costs at which all retailers will buy Sunbeam merchandise it is easy for us to determine their gross margin. If they fall below the averages indicated by this survey we have

reason to believe they are loss-leading and we will cut off supply by counselling our distributors in that area to do so.

Naturally we have no idea of the effectiveness of this legislation and we probably won't have until a test case is brought before us. We have high hopes that this will bring many of the small retailers back into the fold and restore an orderly marketing picture for Sunbeam products."

(Serials 637-638)

It will be noted from the foregoing letter that Mr. Bond interpreted Sunbeam's programme as establishing "minimum profitable resale prices for dealers" and "maximum discounts" which would be allowed by distributors for quantity purchases by dealers. The latter feature of the programme was regarded by Mr. Bond as establishing a floor price for the purchase of Sunbeam products by dealers, because he wrote "Since we will know the costs at which all retailers will buy Sunbeam merchandise it is easy for us to determine their gross margin".

2. Introduction of M. P. R. P. Programme by Sunbeam

The following description of the means taken by Sunbeam to inform distributors and dealers of Sunbeam products of the "Minimum Profitable Resale Price" programme (M. P. R. P.) is given in the following paragraphs in the Statement of Evidence:

"14. On or about September 14, 1960, the following circular letter (hereinafter called Dealer Circular) was distributed to retailers of Sunbeam products throughout Canada by Sunbeam:

'To All Sunbeam Dealers:

In the interests of orderly marketing, on August 1, 1960, the Government passed an amendment to Section 34 of the Combines Investigation Act which, in effect, acknowledges that 'loss-leading' is not in the public interest.

This legislation falls short of the objective that we have worked for when it is understood that it remains illegal for any manufacturer to maintain a resale price - but it is a major step forward.

The purpose of this letter is to make our attitude toward this new legislation abundantly clear.

In the interests of the consumer and the trade, we consider it fair and prudent to announce to you the details of this new legislation, to state our intentions, and to define as clearly as possible what, in our opinion, will constitute loss-leading of our products, so that all concerned are duly advised and the practice of withholding supply can be avoided through understanding.

The new legislation provides that shipments may be withheld from any person who in our opinion makes a practice of:

(1) Loss-leading our products.

that is: using our products for the purpose of advertising and not for the purpose of making a profit.

or: using our products for the purpose of attracting customers and not for the purpose of selling our products at a profit.

(2) Engaging in misleading advertising of our products.

such as: using our trademarks in advertising with the intention of supplying other brands, misrepresenting price, etc.

(3) Not providing service that purchasers might reasonably expect.

such as: offering accurate information re features and operation at the time of purchase, and assistance and direction regarding repair after use as necessary.

It is our opinion that a person loss-leads our products when he sells them at a gross margin less than his average cost of doing business plus a reasonable profit.

We have drawn conclusions from evidence available as to the operating costs of a variety of dealers who sell appliances and are efficiently organized to merchandise effectively and provide reasonable service. These conclusions are set forth specifically in the column headed 'Minimum Profitable Resale Price' in our new Dealer Price Sheet enclosed, effective September 15, 1960. The offering of our products below these prices will be investigated as cases of loss-leading.

It is our intention to withhold supply, or to counsel with our distributors to withhold supply, from persons who make a practice

- of loss-leading our products
- of engaging in misleading advertising
- of not providing a reasonable level of service

Your complete co-operation is requested. It will result in increased consumer satisfaction and all the other obvious advantages of orderly marketing'.

(Serials 641-642)

15. The Dealer Price Lists which accompanied the Dealer Circular, and are referred to therein, are in evidence as serials 643-649 and 1261-1267, both inclusive. Each product has opposite it three prices: 'Suggested Dealer Price', which is the price at which distributors and wholesalers sell to retailers; 'Minimum Profitable Resale Price', which is the lowest price at which retailers are permitted by Sunbeam to sell, and 'Fair Retail Value', which is the suggested resale price for retailers. The following is an example:

<u>Catalog No.</u>	<u>Suggested Dealer Price</u>	<u>Minimum Profitable Resale Price</u>	<u>Fair Retail Value</u>
(Illustration) B2 Automatic Baby Bottle Warmer (A.C. only) . . .	16.77	19.95	23.95

(Serial 644)

16. Between September 1 and September 17, 1960 approximately at and following a series of local wholesaler meetings, the following circular letter (hereinafter called Distributor Circular) was distributed to all distributors of Sunbeam products throughout Canada by Sunbeam:

'To All Sunbeam Distributor Executives

Dear Sirs:

After careful investigation we have satisfied ourselves that you cannot make a profit on a sale of Sunbeam products listed below, if you sell such goods in lots of less than twelve pieces at prices less than our 'Suggested Dealer Price' and in lots of twelve or more pieces, assorted or otherwise, on

one order and on one delivery, at prices less than 5% off our 'Suggested Dealer Price'.

Products referred to above are:

SUNBEAM APPLIANCES

SUNBEAM ELECTRIC SHAVERS

SUNBEAM FLOOR CARE PRODUCTS

as shown on Dealer Price Lists enclosed, dated Sept.15, 1960.

We have further satisfied ourselves that you cannot make a profit on the sale of our Sunbeam Floor Care Products to a dealer buying only Sunbeam Floor Care Products if you sell such goods in lots of less than four pieces at prices less than our 'Suggested Dealer Price' and in lots of four or more, assorted or otherwise, on one order and one delivery, at prices less than 5% off our 'Suggested Dealer Price'.

The foregoing comments apply only to complete Sunbeam products and do not apply to replacement parts.

Hereafter, if we find that sales are being made at prices less than those suggested above, we shall give consideration as to whether such sales are loss-leader sales and assess our position as it relates to the marketing of our products.'

(Serials 639-640)

This Distributor Circular was accompanied by a copy of the Dealer Circular as well as the Dealer Price Lists, and included a Distributor Price List for some products.

17. On January 2, 1961, Sunbeam distributed revised Dealer and Distributor Price Lists, superseding for the products shown, all those previously issued and effective throughout Canada. The Dealer Circular is reprinted on each of the Dealer Price Lists, (Serials 1397 to 1413 inclusive).

18. On March 11, 1961, Sunbeam distributed a second revision of the Dealer and Distributor Price Lists, superseding for the products shown, those of January 2, 1961, and effective throughout Canada. The Dealer Circular is reprinted on each of the Dealer Price Lists, (Serials 1438 to 1461 inclusive). The distribution of the Dealer Price Lists was made by sending bulk quantities of them to Sunbeam distributors who in turn distributed them to the individual retail dealer, (Serial 1437).

18A. Effective June 17, 1961, Sunbeam established new price lists for 'Direct Buying Retailers', which superseded all previous such prices and to be effective throughout Canada. The Dealer Circular is not reprinted on these price lists. These Direct Buying Dealer Price Lists applied to the Appliance, Shavemaster and Floor Care divisions of Sunbeam. Distribution of these Direct Buying Dealer Price Lists was by direct mailing by Sunbeam to each such dealer. (Serials 1506-1518).

18B. The M. P. R. P. on the price lists of January 2, March 11 and June 17, 1961 is the same, or higher, as on the September 15, 1960 price list for those articles with identical model numbers, with the following exceptions in which the M. P. R. P. was reduced: Shaver #333A, Shaver #333-12AH, on January 2, 1961; Floor Polisher #620, Fry pan lids #FMC-M, #FD-L and #FMC-L, on March 11, 1961; Hair dryer # HD, on June 17, 1961. Twenty-one articles had their M. P. R. P. increased on the March 11, 1961 price lists as compared to the September 15, 1960 and January 2, 1961 price lists.

19. The Dealer Circular was very widely distributed to the retail trade throughout the whole of Canada. According to a memorandum from R. G. Bromley, an employee of Sunbeam, to J. C. Hall dated September 27, 1960, approximately 21,000 dealer circulars were mailed between September 16 and September 21, 1960. (Serial 756).

This memo also states:

' . . .

On our mailing list we do not profess to give 100% coverage as this would be most uneconomical. However, as you are aware, our mailing lists are broken down into special dealers which are the dealers whom the salesman has requested us to place on our mailing list, or is considered a large and active dealer measured by guarantee card returns. The active dealer list are those dealers from whom we have received guarantee cards indicating they have sold two or more appliances within the past two years. Our inactive list are those dealers whose customers have returned guarantee cards at some time in the past six years but from whom we have not received guarantee cards in the past two years. Dealers who have been inactive as far as Sunbeam is concerned prior to 1954 would have been deleted from our list when a complete revision was made when we moved into our plant here in April of 1955.

. . . '

(Serial 756)

20. On September 29, 1960, J. C. Hall stated in a memorandum to W. B. Thompson, a Sunbeam salesman:

' . . . by now every dealer who has bought any Sunbeam appliances over the last three years should have our letter'.

(Serial 754)

. . .

26. On October 3, 1960, Mr. L. F. Fitzpatrick, Jr. addressed the following quotation to 'All Addressees' with respect to participation by those addressees, all being Sunbeam employees, in group discussions with distributors in Western Canada, arranged by Mr. Joseph Crowder, Manager of Canadian Wholesale Council, for the purpose of explaining the amendments to the Combines Investigation Act in 1960:

' . . .

Generally speaking, your comments should be as follows --

---Make it completely clear that it is illegal for anyone to maintain a price.

---While the present law is not all that we have hoped and worked for, it is a big step forward.

---At long last the Government has gone on record to indicate that loss-leading is not in the public interest.

---The law points out that if we should withhold supply from a Dealer, in the litigation that might follow, we would not be looked upon unfavourably if IN OUR OWN OPINION merchandise is being withheld from a Dealer we consider is loss leading our products.

At this point, you might fill in from our policy letter and outline the mechanics of our plan. You will point out that we have expressed OUR OPINION in a positive fashion as a guide to all concerned. This appears specifically and permanently on the price sheet in the column headed 'Minimum Profitable Resale Price'. You

will continue on to point out the margin that the Dealer will be able to earn if he should sell at this price while buying at suggested Dealer cost or better, if his volume purchasing permits it.

---The Distributor's stake in this plan, is a most important one. Loss-leading at the wholesale level will be prevented which means increased margin at the wholesale level and in addition, thousands of Dealers will come back into Sunbeam business, which means increased volume.

. . . ' "

(Serials 800-801)

CHAPTER IV

EFFORTS OF SUNBEAM TO SECURE ADOPTION OF M.P.R.P. PROGRAMME

1. Meetings of Sunbeam Distributors

The evidence reviewed in the previous chapters shows that the M.P.R.P. programme of Sunbeam had two main features. One was the "Minimum Profitable Resale Price" which would guide Sunbeam in its consideration of the prices of retail dealers, and the other was the maximum discounts allowed by distributors for quantity purchases by dealers. It has also been shown by the evidence already reviewed that Sunbeam held distributor meetings in a number of cities across Canada for the purpose of explaining the M.P.R.P. programme. Evidence obtained in the inquiry indicates that the following meetings, at least, were held: Montreal Distributors, Quebec City Distributors, Toronto Distributors, Hamilton Distributors, Kitchener District Distributors, London District Distributors, Manitoba Distributors, Saskatoon Distributors and Calgary Distributors. The foregoing meetings were held between September 1 and 17, 1960.

Certain handwritten notes entitled "Special Meeting - Bill C 58", dated August 31, 1960 were obtained in the inquiry from the office of Mr. J. C. Hall, then Assistant General Sales Manager of Sunbeam. The handwritten notes were attached to other documents recording the distributor meetings held in Toronto, Manitoba and Saskatoon (Serials 929, 930, 932, and 935). During argument before the Commission it was pointed out by counsel for Sunbeam that the evidence in the inquiry does not establish to what extent the handwritten notes indicate what was said at distributor meetings. The notes review the policy of Sunbeam prior to the amendments to the Combines Act in August, 1960 and indicate the manner in which Sunbeam viewed the M.P.R.P. programme which was then being introduced. The notes contain the following:

" . . .

Within a very few days you
will receive a letter from Sunbeam
Read letter
Cover firmly -

Step one - Will eliminate unprofitable
selling of Sunbeam by any distr
from coast to coast

Step 2 - Must eliminate unprofitable
selling of Sunbeam by any
dealer from Coast to Coast.

Again, we've had independent
Survey group

On Sept 14th
Dealer letter
Cover Price list
Cover policy!
Cut off distr who continues
to deliver

. . .

Our men have been instructed.
Police.

You have our assurance that
we mean business.

We will refuse deliveries to
Distr.
Dept store
and we will insist that you
discontinue deliveries
to any dealer
who is selling Sunbeam
below our
Minimum Profitable Resale Price.

. . . "

(Serials 941-943)

A meeting of Sunbeam distributors in the area was held in Quebec City on September 2, 1960. Sunbeam was represented by Mr. J. C. Hall, then Assistant General Sales Manager and Mr. Gaetan Desmarais, a Sunbeam salesman. The latter prepared a report of the meeting which included the following:

". . .

1) J. C. Hall welcomed and thanked those present for attending

meeting called on such short notice and then proceeded to explain in details the purpose of this new amendment to section 34 and informed all present of the new policy being adopted by Sunbeam Corporation Ltd with regard to discounts and price cutting.

- 2) It was unanimously agreed that new discount policy was to take effect immediately, but that orders being shipped till 5 o'clock p.m. on said day could be allowed whatever discount the goods were sold at, but no orders would be taken and given former discounts.
- 3) During the discussion the following points were raised:
by R. Turcotte of Jos. Cote Ltd.: 'Hidden discounts'
 'Ways and means to allow
 more than 5%'
by M. Gingras of Chinic Hdwe Co.: 'Will a distributor be
 given a second chance if
 caught giving more than
 5%'.
- 4) J. C. Hall then also explained what constitute a 12-piece Order and what are parts and accessories, etc.
- 5) 2% cash discount was agreed upon.
- 6) After much discussion, it was agreed that dating was permissible, 60 days till 31 Oct."

(Serial 886)

Mr. Hall also made the following report of the meeting in a memorandum of September 6, 1960 to Mr. L. F. Fitzpatrick, Jr.:

"Once again, Leo, our meeting in Quebec like the one in Montreal was a complete success.

We started at ten o'clock in the morning with complete attendance of all Quebec distributors plus Mr. Auger from Auger & Fils Limited, Victoriaville. He had been unable to attend the Montreal meeting so by telephone we persuaded him from Montreal that he should attend the Quebec meeting.

Because of the short notice involved we did not make any attempt to have distributors from Rimouski and Chicoutimi

in attendance.

I covered the complete story with them, made it very firm and every one in attendance had a complete understanding of the programme.

In our question period after, it was decided that all distributors would give a two percent cash discount to all accounts who paid their accounts according to their terms but that their terms would not exceed the fifteenth of the following month. This, of course, is on regular business throughout the year.

After a long discussion in french which I was not able to control and in fact wasn't too anxious to do so it was decided that on Christmas stock orders or booking orders the distributors in the Quebec area would allow sixty days. This would apply on any orders placed prior to October 31 at which time all dating would be withdrawn.

Everyone was delighted with the programme and they all felt that it could be most successful. We had a complete agreement from each one of them and they all understand exactly what our policies on this matter are going to be.

After the meeting, I telephoned Cote Boivin & Cie Inc. at Chicoutimi and Mitis Company Ltd., at Rimouski where I talked to Mr. Labrie, the President, and went over the details with them. They, too, were in accord with the plan and agreed that as of that moment they would no longer offer any more than our suggested discount schedule. Other details were explained to them as well.

W. Ouellett & Fils Ltee were contacted by telephone but unfortunately there was no one in authority there. All had left for the long weekend.

Arrangements have been made with Gaetan Desmarais that he will drive to both these places on Tuesday and go over every detail of our programme with them.

I feel that there is a complete understanding now throughout the Province of Quebec and all that remains now is for us to continue with a very firm stand on our policy. "

(Serials 884-885)

As indicated in Mr. Hall's memorandum quoted above, a meeting of Sunbeam distributors in the Montreal area preceded the meeting in Quebec City. One of the distributors represented at the Montreal meeting was Les Marchands en Quincaillerie Limitee, whose General Manager was Mr. J. R. Dansereau. At some time prior to the Montreal meeting this distributor had circularized its dealer accounts with a "flyer" listing a number of Sunbeam products at prices lower than the minimum profitable resale prices which Sunbeam had prepared for inclusion in its Dealer Price Lists. The question of the flyers put out by Les Marchands en Quincaillerie Limitee was taken up at the Montreal meeting of Sunbeam distributors and Mr. R. J. Day, a senior salesman of Sunbeam, reported the outcome of the discussion as follows in a memorandum dated September 11, 1960 to Mr. J. C. Hall:

" . . .

You will recall the question of their flyers at our meeting and the rapid speed in which Walter Jamison, (Union Electric) produced a copy. We all agreed that a definite termination (cut off) of this flyer was imperative and that the dealers would be advised accordingly. Mr. Dansereau accepted this decision and has lived up to his promise. You will recall that it was decided from the date of our meeting (Sept. 1st) to the effective date of our new price list that this would give the dealers ample time to dispose of their flyers which in most cases were already in their hands. It was also mentioned that the life of any such flyer was approximately seven days.

. . ."

(Serial 1006)

The Director made the following comparison of the retail prices advertised in the flyer of Les Marchands en Quincaillerie Limitee with the minimum profitable resale prices in the Sunbeam Dealer Price List of September 15, 1960:

<u>Product</u>	<u>Flyer Price</u>	<u>Sunbeam M. P. R. P.</u>
Steam iron, model #S-5	\$ 14.44	\$ 17.88
Deluxe Workshop model drill 3/8"	19.99	***
Automatic Mixmaster Mixer *	29.98	32.95
Electric Can Opener *	21.98	23.95
Deluxe hair dryer *	27.50	30.95
Vacuum cleaner *	67.98	89.50
Hand mixer, push button **	16.99	21.95 or 23.95
Automatic toaster, model T-10	19.98	22.95
Floor conditioner (Polisher) *	32.99	42.95
Fry pan, model FPM	15.50	17.95

* Model identified by comparing the illustration and regular price shown in the flyers with those shown on the Dealer Price List of September 15, 1960.

** Model not identifiable by comparison of illustration and regular price on flyer with those on the Dealer Price List; however, only two hand mixers are shown on the Dealer Price List, each of which has a M.P.R.P. above \$16.99.

*** No M.P.R.P. established for this item.

Sources: Sunbeam Dealer Price Lists of September 15, 1960, and Serials 1009-1011.

2. Approaches by Sunbeam to Retail Dealers

Correspondence between Sunbeam employees in the period immediately after the introduction of the M.P.R.P. programme illustrates the manner in which the programme was applied and some of the objectives which were being sought.

Mr. F. J. Taylor, a Sunbeam salesman, wrote to Mr. L. F. Fitzpatrick, Jr. on September 7, 1960 in regard to the prices of Sunbeam products in the Toronto stores of the T. Eaton Co. Limited. His letter contained the following:

". . .

Gerry Shier -- who to all intents and purposes -- should be the one to formulate direction from the departmental supervisor level downward -- views our policy with some

skepticism and doubts if it will work with the Honest Eds' [sic] etc. in the background -- and has therefore stated he will not raise prices until he is sure all dealers have moved into our Minimum Profitable Resale bracket.

. . ."

(Serial 889)

In a letter of September 20, 1960 to Mr. J. C. Hall, Mr. W. B. Thompson, a Sunbeam salesman in British Columbia wrote:

". . .

. . . As far as my Floor Care Div dealers go, the only dealer that is cutting our polishers at present (that I know about) is Collin Ryan of A.B.C. TV. I talked to Collin today, but he wouldn't assure me of raising and I hesitate to do anything until the before-mentioned letters and price sheets are here.

. . ."

(Serial 762)

Replying to this letter on September 29, 1960 Mr. J. C. Hall wrote:

". . .

I can imagine that Collin Ryan of A.B.C. Television is causing you a problem. I have had similar ones with him in the past, Bill, but after a lot of hard talking I have managed to persuade him to come up to the price that I wanted him to do so. I can only suggest first that you try every means you can to get him to raise his prices to our minimum profitable resale prices, then if he absolutely refuses and if he runs any ads, let us have them and we will take action immediately. I would like you to keep me posted on this or any other discrepancies there may be with other dealers in the British Columbia area."

(Serial 761)

Mr. Gaetan Desmarais, a Sunbeam salesman who dealt with customers in Quebec, wrote as follows to Mr. J. C. Hall on September 20, 1960:

" . . .

. . . Mr. Morency assured me that Les Marchands Dealers would act in accordance with Mr. Dansereau's instructions and would maintain prices and that he himself agreed to our Minimum Profitable Retail Prices and that as soon as officially advised by Dansereau he and the other Marchands' Dealers in the Region would retail our merchandise as per our Price List.

. . . "

(Serial 1005)

On September 21, 1960 Mr. J. C. Hall wrote to Mr. Gaetan Desmarais:

" . . .

In any event, Gaetan, we deem it important that you contact the two dealers involved and cover very fully with them Sunbeam's plan under Bill C58. From a legal angle it is most important that the dealer involved be fully advised on all details of our minimum profitable resale price and the results of 'loss-leadering' insofar as the dealer is concerned.

I have personally found, Gaetan, that in talking to these people many times they are only too delighted to move the prices up to the correct level.

If, after they have been advised of all details by you, they persist in this action we will take immediate steps to advise Mr. Dansereau to withhold delivery.

. . . "

(Serial 914)

As indicated in the preceding section of this chapter, Mr. Dansereau was General Manager of Les Marchands en Quincaillerie Limitee, a Sunbeam distributor in the Province of Quebec.

A Sunbeam bulletin, dated October 6, 1960 and directed "To All Salesmen", contained the following:

". . .

Persuade every dealer to get his prices both 'In Store' and advertised up to or above Sunbeam's 'Minimum Profitable Resale Price' - This is your job, it's got to be done and done fast.

Your present Discount Houses can become your greatest allies but they won't be undersold -- get them to lead but make sure every account meets their prices fast. Remember, 'an ounce of prevention is worth a pound of cure'.

". . ."

(Serial 873)

The following was contained in a letter of October 7, 1960 from Mr. Thompson in British Columbia to Mr. J. C. Hall:

". . .

. . . I did not find our 610 selling in any store at more than \$39.95, and each dealer was asked to increase his retail price to one above our 'Floor Price' so that he could not be accused of using Sunbeam as a Loss Leader. Most dealers were willing to co-operate, in fact, I would estimate that 90% were for our program, and the remaining 10% were non-committal. Such outlets as Fletcher Music, the 'Wosk of the Island' who had our 610 priced at \$35.95 would not budge until they were told by the Nanaimo Office to do so. The Management of this Company agreed that they would raise all prices and the Manager of the Mc & Mc Stores will be asked to issue similar instructions to his stores.

". . ."

(Serial 752)

The 610 model referred to in Mr. Thompson's letter was apparently Sunbeam's 610 Deluxe Floor Conditioner which had a Distributor Net Price of \$29.71, a suggested Dealer Price of \$36.23 and a M.P.R.P. of \$42.95 (Exhibit H-11). In the flyer of Les Marchands en Quincaillerie Limitee, referred to in the previous

section, the Sunbeam Floor Conditioner had a retail price of \$32.99.

In a reply to Mr. Thompson on October 14, 1960 Mr. Hall wrote:

" . . .

I am glad to see, Bill, that you too are working as I would expect you would in getting all prices up to at least our minimum profitable resale price.

. . . "

(Serial 751)

Also on October 14, 1960 Mr. J. C. Hall wrote to Mr. R. D. Schell, a Sunbeam salesman in Vancouver, as follows:

" . . .

Frankly, we are in a bit of a spot in regard to 'in store' pricing and from time to time we may be embarrassed from it. Actually, we have nothing of a legal background that says we can take action against an account who has an 'in store' price that is below our minimum profitable resale price in that they are not using it in the way of advertising to draw people into their stores.

We, of course, are not admitting this out loud, Dick, and are making every effort to get 'in store' pricing up but as far as our taking legal action against them, I don't think that we would have any ground for so doing.

I would suggest, Dick, that seeing you are going in and calling on this Mr. Ludwig that you continue to do so endeavouring to obtain his co-operation by pointing out that no one will be selling any less than he is and doing your best to get him to come up to our prices on this basis.

. . . "

(Serial 740)

In a letter to the same salesman on November 8, 1960 Mr. Hall dealt with the subject of London Drug Limited, a Vancouver retail pharmacy, obtaining Sunbeam razors:

" . . .

About the only thing I can suggest is that you keep right on top of this, Dick, and find out if he does get any 555's in. Certainly, he has not bought them from a Sunbeam distributor. Watch his counters very closely and do everything possible you can to get him to maintain our 'minimum profitable resale prices'.

. . . "

(Serial 835)

The matter of the flyers put out in Quebec by Les Marchands en Quincaillerie Limitee continued to arise in Sunbeam correspondence. In a letter of October 18, 1960 to Sunbeam salesman, Mr. R. J. Day, Mr. J. C. Hall wrote:

" . . .

. . . In my mind he [Dansereau] had ample time for the 'flyer' to have done its job and the prices should go up immediately. Keep in close touch with him on this, Bob, and let's get those prices up.

Like you, I express some concern regarding the $\frac{1}{2}$ of 1% which is given his dealers in lieu of prepaid shipments, however, that particular matter was not cleared too definitely at our meeting, as everyone seemed to have a different policy. I'd suggest we overlook it for the time being and if we start to get a number of complaints, we can look into it further at that time".

(Serial 988)

The following letter was sent by Mr. Hall to Mr. Dansereau of Les Marchands en Quincaillerie Limitee on November 1, 1960:

" . . .

We have had one complaint, however, from dealers and distributors at Chicoutimi, Quebec. We are advised that

your dealer there, Jalbert Limited has not followed the suggestions outlined in your letter and that he is still selling Sunbeam products at less than the 'minimum profitable resale prices'. For example, the Model 630 Sunbeam Vacuum Cleaner is being sold at a suggested list price of \$67.95.

It would be appreciated if you would contact this dealer and suggest to him that he sell only at prices which show him a profit as outlined on our Sunbeam price list of September 15, 1960.

. . ."

(Serial 1001)

The Sunbeam Vacuum Cleaner had had a retail price of \$67.98 in the flyer of Les Marchands en Quincaillerie Limitee. In Sunbeam's price lists this article had a Distributor Net Price of \$57.11, a Suggested Dealer Price of \$69.65 and M.P.R.P. of \$89.50 (Exhibit H-11).

Mr. B. C. Freeman, a Sunbeam salesman, wrote to Mr. L. F. Fitzpatrick Jr., with a copy to Mr. J. C. Hall on November 12, 1960 in regard to efforts he had made to have the prices of Sunbeam products increased in the store of Cavers Brothers in St. Catharines, Ontario:

" . . .

I smile when I read the first paragraph of Caver's letter Nov 7/60 - It so happened I did get 'exercised' after the third call requesting price increases - finally he told me if I wanted them changed I would have to change them so I did.

. . .

(Serial 927)

Mr. Hall wrote to Mr. W. B. Thompson on November 14, 1960 in regard to "in store" prices of Sunbeam products:

" . . .

Legally, Bill, we can do absolutely nothing on 'in store' prices other than work our hardest to persuade dealers to bring their 'in store' prices up to at least our M. P. R. P.

prices, however, if a dealer advertises our products in the newspaper at lower than M. P. R. P. we can, of course, take action although, Bill, frankly it is necessary that they 'make a practice of' so it would have to happen two or three times. In addition, Bill, if a dealer ran a large ad on Sunbeam appliances without any prices whatsoever but if his 'in store' prices were below M. P. R. P. we could then take action.

. . . "

(Serial 874)

On October 27, 1960 Mr. W. R. West, a Sunbeam salesman in Toronto, wrote to Mr. L. F. Fitzpatrick Jr. in regard to the sale of Sunbeam Shavemaster razors by a large branch of a variety store chain:

" . . .

On Monday - Oct 24 - I completed my appointment with Mr. Tobiason, Store Manager of Kresges - Main Store - Richmond & Yonge Sts and unfolded our complete shaver programme, backed up with current price sheets plus a copy of our Dealer Mailing Letter pertaining to our new marketing policies.

Kresges in the past few years, have been considered a 2 month shaver account (Nov & Dec) purchasing their stock from Toronto Importers and directly from Schick. Their low low prices have caused considerable consternation to the Toronto shaver accounts particularly from Simpsons & Eatons.

Mr. Tobiason informed me that he had no intention of selling our new 555 Shavemaster at \$29.95, but probably open his prices at \$22.99 to \$24.99. He further indicated that our 555 unit was a terrific shaver, and that he definitely would be handling it, having had consumer requests for same.

My efforts not to have Kresges handle our 555 unit I am concerned, [sic] went unheeded, and obviously when the supply of shavers increases we can expect a very low 'in store price' and perhaps a low retail priced advertisement, in one of the local Toronto papers. As discussed with you, I believe every effort should be

employed by us immediately, to discourage this account from handling our Shaver Line, rather than wait for the damage to occur. If we were successful in this endeavour, it could be termed as a real plus venture, and would increase our Department Store Shaver Sales Forecast - Eatons & Simpsons. Kresges will be murdering the prices of Schick - Remington & Philishave & Ronson. Once Kresges break our 'Minimum Floor Prices' re shavers, Eatons and Simpsons will have no other alternative but to meet these prices, as they have done in previous years. Obviously other Toronto Dealers will follow suit, and hence our Shaver Programme comes to an end!

. . ."

(Serials 778-779)

Mr. Fitzpatrick wrote on the same subject to Mr. J. C. Hall on October 31, 1960:

"On Wednesday, October 26th, Bill West reported a possible danger atmosphere in Kresges with regard to Shavemaster.

In checking on instore pricing, Bill made contact with Kresges in their downtown location, Mr. Tobiason. After a careful and thorough review of our principles in planning with regard to loss leading, Mr. Tobiason has kindly as possible, told Bill that he felt that he should be honest with him, and admit openly that he had no intepcion of supporting this plan.

I know you will recall how damaging Kresges actions were in downtown Toronto last year on electric shavers prior to Christmas time. They were at that time procuring [sic] shavers through Trans World, they actually used newspaper advertising and were a constant thorn in the sides of our departmental stores in the immediate vicinity. The matter is a critical one.

. . .

Considering our progress to date, I do feel however, that this atmosphere of counselling with our dealers is a most important one. I think that you will have to agree that following last year's practice, Kresges will concentrate on shavers again this Fall, and they will be in the newspapers

and they will not be at our prices. I think we will have no alternative but to contact the highest man possible inside Kresges, outline our plans completely and draw this matter I hope, to a favourable conclusion. It is obvious that they can do anything they wish with any other electric shaver, because the manufacturers are apparently not concerned. Meanwhile, on this shaver counter, he could make profit by selling up to the model 555 shavemaster which we know, and they will soon come to realize, will be in extremely heavy demand at this price."

(Serial 982)

In a bulletin to all salesmen, dated October 6, 1960, Sunbeam gave the following directions for the sale of Sunbeam products to and by public utilities and hydro companies:

"Over the past few years, some of the power companies in Canada have become quite aggressive in the sale of our merchandise through regular sales to their employees or through a special campaign which we may have arranged with them.

The power companies have, in almost all cases, purchased the merchandise through our distributors, however, in many cases a distributor was working on a very small profit as he had to give large discounts to the power companies in order to get the business.

Under our new merchandising programme we have advised all of our distributors by our letter of September 1, 1960, signed by Mr. L. F. Fitzpatrick, Jr., that it is unprofitable for a distributor to sell any of his customers in lots of twelve or more at a discount larger than 5% and in lots of eleven or less with any discount. This recommendation must also apply to public utilities or privately owned power companies. Therefore, in any contacts you may have with power companies the only discount that you will be able to quote will be 5% from dealer cost in lots of twelve or more.

Insofar as 'close-outs' or the sale of items no longer shown on our price lists are concerned, the prevailing discount in the area would prevail.

Every effort must be made to have the Utility offer our products to their employees at only the 'Minimum Profitable Resale Price'. A photostat of an article run in the Toronto Daily Star on October 5, 1960, which is most critical of the Ontario Hydro's employees' plan is attached."

(Serial 675)

CHAPTER V

APPLICATION OF M.P.R.P. PROGRAMME BY SUNBEAM

1. Faucher Electrique Limitée, Montreal

Faucher Electrique Limitée, sometimes referred to as Faucher, is a Montreal retail establishment. Faucher is described in Sunbeam correspondence as a price cutter and in its advertising Faucher has described itself as "Le Roi des Bas Prix".

Sunbeam's policy in dealing with Faucher under the M.P.R.P. programme was described in a letter of September 29, 1960 from Mr. R.J. Day, a Sunbeam salesman in Montreal, to Mr. J.C. Hall:

" 'THE DEALER PLAN OF ATTACK'

We all know full well the quickest way to establish and successfully accomplish a more orderly market in the merchandising of Sunbeam appliances is to gain the full support of your leading price cutters. In the case of Montreal our leader is Faucher Electric. We have many others who continuously push the same band wagon however, not as significant as our subject dealer. Obviously the truth of this statement rests in the tremendous growth which he has accomplished over the last few years.

Simultaneously we are faced with the problem of covering the entire market immediately and assure ourselves along with Faucher that every dealer has responded to the M.P.R.P. programme. We are already convinced on the support from departmental stores, especially Eaton's, Morgan's, Dupuis Freres and even Simpsons if Faucher maintains the selling of Sunbeam appliances (in store) at M.P.R.P.'s.

Our two basic objectives in lining out a successful plan was:

- a. Set up effective newspaper advertising at M.P.R.P.'s.

- b. Establish the same efficient merchandising programme on in store activity. In other words do not fall below the level of M.P.R.P.'s.

I submit herein the results of our concentrating to establish this programme.

2 copies of Faucher's 'SUNBEAM' ad which appeared in today's Montreal Star. I am also enclosing a corrected proof of a similar ad which will appear in the Montreal La Presse on Friday, September 30th.

As for the orderly manner for 'instore' activity, a complete understanding was reached with Faucher (during the wee early hours) Wednesday morning. Immediate steps were taken to assist him with adjusting the 'old programme' by tagging every Sunbeam appliance in the store to our M.P.R.P. programme.

Plans are also under way to run a complete page in this week-end 'Petit Journal'.

I will keep you posted on further progress."

(Serial 690)

It will be noted from the report made by Mr. Day that Sunbeam sought to have Faucher adopt the M.P.R.P. basis not only for newspaper advertising but for "in store" pricing as well. Sunbeam's concern with the "in store" prices of Faucher continued during its future dealings with this retailer as disclosed by the evidence in the inquiry, and the evidence reviewed in the previous chapter indicated a similar attitude on the part of Sunbeam in other instances.

According to reports of Sunbeam salesmen, Faucher's full observance of the M.P.R.P. programme did not continue very long. On October 12, 1960 Mr. R.J. Day sent the following telegram to Mr. J.C. Hall:

"HERE ARE THE FACTS FAUCHER CLAIMS HE WAS NOT AWARE OF LAST WEEK'S NEWSPAPER LISTINGS OF SUN-BEAM APPLIANCES STOP ADMITS HE WOULD PREFER TO WORK WITH SUNBEAM STOP WILLING TO CONTINUE CO-OP ADVERTISING AT MPRP STOP WILLING TO INCREASE FLOOR PRICES TO MAXIMUM TEN PERCENT ON SUGGESTED DEALER COST AND TRADE AT THIS LEVEL STOP THIS PRESENTS A PROBLEM SIMPSON'S WOULD MEET FLOOR PRICES AND INVARIABLY OTHER DEPART-MENT STORES WOULD BE FORCED TO FOLLOW STOP

FAUCHER COULD CREATE TREMENDOUS DISTURBANCE
IF WE DECIDED TO TURN OUR BACK ON HIM STOP I
WOULD PREFER TO HAVE HIM ON OUR SIDE STOP LET'S
NOT LOSE SIGHT OF THE FACT THAT HE IS A MAJOR
SUNBEAM DEALER STOP."

(Serials 1228-1229)

A further report on Faucher's advertisements of Sunbeam's products and an account of a visit by a shopper to the Faucher store were sent by Mr. R.J. Day to Mr. J.C. Hall on October 16, 1960:

"Please find enclosed advertising copies by the subject dealer.

La Presse -	October 6th	Incorrect prices (Listing only)
Le Petit Journal -	" 9th	" " " "
La Presse -	" 15th	Specials listed at close-out prices.
		T-35 - no price - T-20 illustrated.
		S-5 Steam Iron at \$9.95

Faucher was shopped on Saturday and refused to sell the S-5 at this price. He claims that it was an error of the newspaper and furthermore he did not have the S-5 in stock - his stock is Model S-5-A. The same shopper referred to his price in this weekends' 'Le Petit Journal' at \$13.95 - he claimed that this was also an error as their price on the S-5-A is \$15.50. However, in view of the fact that the shopper insisted on a Sunbeam Steam Iron at \$9.95 - Faucher did agree to sell the unit at \$13.95. Shopper did not buy.

As you can see in the ad of October 15th he's playing his cards cagey by staying within range of direct criticism by the manufacturer (with the exception of the S-5) he realizes that the manufacturer can also make it uncomfortable for him. However, this does not prevent him from applying other tactics on in store sales. The nonsense continues and this is where we are exposed to serious criticism from other dealers - mainly the Robert Simpson Company."

(Serial 1219)

Mr. Hall sent the following letter to Mr. Day on October 18, 1960:

"Many thanks for your telegram regarding Faucher's recent ad and his 'in store' pricing.

I regret the delay in answering this but only had an opportunity of talking it over with Leo yesterday afternoon, Friday the 14th.

It is our opinion, Bob, that you must do everything possible to persuade Faucher that his 'in store' prices must come up to our 'minimum profitable resale prices'.

If this cannot be done, I am sure that you will agree with me that Simpsons will reduce their 'in store' prices and possibly their advertising prices as well to whatever Faucher's prices may be in his store.

We agree with you that Faucher could create a disturbance if it is decided at any time to discontinue deliveries to him and like you, we would rather have him on our side than fighting him. We agree with you, too, that he is a major Sunbeam dealer but if he continues to operate as he has in the past he will end up being our only dealer in the City of Montreal and possibly the Province of Quebec and we certainly feel that we would be willing to give up all of Faucher's business and have the backing of every other dealer in the Province of Quebec.

Bob, you and Jacques have a terrific challenge in this programme and between the two of you, I feel sure that eventually you will swing Faucher to our way of thinking and to a more profitable operation for himself. He can be assured, if he will go up in price, that no one will be underselling him and with his fantastic advertising, he will still draw business at 'minimum profitable resale prices' and in my mind take a lot of it away from the department stores who will not advertise to the same extent. As we said so many times at Conference, it's up to you, Buddy! "

(Serial 1198)

It will be noted that in the concluding paragraph Mr. Hall said that Faucher could be assured that if he would put up his prices no one would undersell him.

Further efforts were made by Sunbeam salesmen to have Faucher adopt the M.P.R.P. programme and possibility of some success in this direction was reported to the Sunbeam office in Toronto along with examples of advertisements with prices lower than those established in connection with the M.P.R.P. programme.

On October 31, 1960, Mr. L.F. Fitzpatrick, Jr. wrote to Mr. Hall outlining methods of dealing with the Faucher situation:

"The Faucher file is building up - in the wrong direction. By memo of October 24th, Jacques Roussille has forwarded a copy of a press ad of October 22nd, carrying our 610 Floor Polisher again at \$34.50.

His coming memo suggests a very strong belligerent [sic] attitude on the part of Faucher. For example, Jacques suggests that his general attitude now, is that nobody is going to dictate a selling price to him, and that he wants to be taken to court - that this new law will not stand in front of a judge.

This morning, Friday, October 28th, I reached Bob Day by long distance telephone to discuss this problem further with him. Bob states that he sent a long memo last night in connection with Faucher, and in general says his conclusions are as they have been for some time, that there is only one way out of this problem, and that is to face up to it, and stop supply to Faucher. I told him about Jacques' memo - he was aware of the situation.

I requested the following action on Bob Day's part:

1. To go to Faucher either to-day or to-morrow, and remind him of the ads that he has been running in which lists of products have been shown in which Sunbeam Appliances are included at prices below MPRP levels. His intention is not in any sense of the word to antagonize, to show conclusively that he has not kept his promises about correcting these ads. Bob will request directly for permission to go to the newspapers and have these product listings changed to show the correct prices on Sunbeam products. Bob is not certain at the moment as to whether he will be given that permission or not.
2. To discuss further with him the Polisher ad, because this is not the first time he has run the same layout and price on a 610 - it happened in La Presse on the 12th of October.
3. Bob will once again discuss his attitude toward instore pricing and try to draw this whole matter to a conclusion.

I have asked Bob to make this contact as quickly as possible, and send us a memo outlining completely Faucher's reactions to all requests. In total, this is a sincere approach on Bob's part - with no intention to antagonize. The approach has

been provoked by a constant series of promises on the part of Faucher to go along with Sunbeam, but in every instance, he does just the opposite in the newspaper and in his store.

. . ."

(Serial 1193)

The documentary evidence in the inquiry does not contain later references to Sunbeam's relations with Faucher until a decision was reached to advise distributors to refuse to sell or supply Sunbeam products to Faucher. This action by Sunbeam was set out in a letter of December 5, 1960 written by Mr. L.F. Fitzpatrick, Jr. to "all Sunbeam Distributors":

"Faucher Electrique Limitee of Montreal, Quebec, is advertising and selling Sunbeam products at prices which cause us to believe he is making a practice of using Sunbeam merchandise as loss-leaders, or not for the purpose of selling such merchandise at a profit but for the purpose of advertising or attracting customers to his store in the hope of selling them other articles.

You are hereby advised to refuse to sell or supply Sunbeam merchandise to Faucher Electrique Limitee of Montreal, Quebec, or to any other firm with whom Mr. Roland Faucher is associated under whose name Sunbeam merchandise is being obtained by Faucher Electrique Limitee."

(Serial 1393)

On December 7, 1960 Mr. L.F. Fitzpatrick, Jr. wrote the following letter to the Union Electric Supply Company Limited of Montreal:

"We would appreciate having for our records, photostat copies of all invoices covering the sale of Sunbeam merchandise to Faucher Electrique Limitee, Montreal, from the period of September 1st, 1960 until the present time.

It may be possible that Mr. Roland Faucher has been obtaining Sunbeam merchandise through other Company names. We would appreciate copies of these invoices also.

The information requested, will be extremely useful during the week of December 19th - if possible for you to accumulate it so quickly. If you so desire, and Company

policy might permit, you might forward the originals, and we will have them photostated and return the originals to you promptly."

(Serial 1396)

2. Honest Ed's (1959) Limited, Toronto

Honest Ed's (1959) Limited, sometimes referred to as Honest Ed's, is a retail establishment in Toronto, Ontario, which sells a wide variety of merchandise. According to the evidence, Honest Ed's offers very limited merchandising services and endeavours to sell at lower prices than its competitors. Mr. E.A. Jeffreys, Vice-President of Honest Ed's, gave the following evidence:

" . . .

Q. Would you describe for us the general merchandising policy of your company which I will refer to from now on as Honest Ed's?

A. The merchandising policy - we have to consider first of all that we must sell for less than any other concern because we are the only company that we have knowledge of in Canada that does not provide any delivery service, no exchanges or refunds, no installment buying. Our store facilities are very limited, we do not even provide dressing rooms for the ladies and men to try on garments, etcetera. Therefore, with these limited facilities we feel that we must pass that saving on to the public; otherwise, we are not going to attract customers. So that we are essentially brought down to the buying technique. Our success depends very much on our buying technique because our selling prices do have a ceiling inasmuch as they must be less than what the so-called competition can set.

. . . "

(Evidence, pp. 6-7)

Later in his evidence, Mr. Jeffreys stated:

"A. Ours is an operation where selling price is all important. That is all we have to sell. There are no services, there is no good will build-up other than price. That is the way we view our operation

and as I said, in view of the very limited personalized services which we offer, the relatively poor facilities - no dressing rooms, no fancy fixtures, or broadloom, we simply have to sell for less.

Q. Do you offer telephone order services?

A. No, we do not. Our number does not even appear in the telephone directory.

Q. Do you offer a delivery service?

A. None whatsoever, sir.

Q. Do you offer money back if the goods are not satisfactory?

A. Our policy is no refund, no exchanges.

Q. Do these other retail outlets to which we have referred to your knowledge offer such services?

A. Yes, sir, including installment buying which again we do not do. We do not have any lay-away plans or installment buying.

Q. It is strictly cash and carry?

A. Correct, sir."

(Evidence, pp. 17-18)

Honest Ed's does not regard its competitors as being limited to any one class or group of stores. Mr. Jeffreys testified:

"A. We regard everybody as competition including Eaton's, Simpson's, the discount houses. We feel they are all competition inasmuch as they sometimes come out with advertisements which offer merchandise on occasion at less price than we do. Incidentally, Eaton's and Simpson's buyers are touring our store almost every other day making note of our prices, etcetera. So we feel that we are a unique establishment and therefore it is an open field and we regard everybody as I say as our competitor in the metropolitan area."

(Evidence, p. 7)

Among the commodities being handled by Honest Ed's at the time of the introduction of the M.P.R.P. programme by Sunbeam were certain products of the latter company. On September 16, 1960, which was about the time Sunbeam sent out its circulars to dealers describing the M.P.R.P. programme, Mr. E.F. Bond, Executive Vice-President and Mr. L.F. Fitzpatrick, Jr., Vice-President of Sunbeam, visited Honest Ed's and interviewed Mr. Ed Mirvish, President of Honest Ed's. The following memorandum from Mr. Bond's office describes the nature of the interview:

"Subj: Notes re visit at Honest Ed's, Bloor and
Bathurst Sts., Toronto, Friday, September
16th, 1960

Present: Mr. Mirvish (Honest Ed)
E.F. Bond and L.F. Fitzpatrick, Jr.
of Sunbeam Corporation

Mr. Mirvish was asked directly as to his purpose in using the Sunbeam Steam and Dry Iron in recent advertisements. . . .

-- specifically, August 13, 1960, and September 15, 1960, in the Toronto Telegram, at the price of \$10.99.

-- he explained that he lacked the benefit of higher education and his approach to the problem of merchandising was based on simple economic facts. He acknowledged that the nature of his business was such that it was necessary to loss-lead certain products in order to attract customers to his store with the hope that they would buy other thingsif not on that immediate occasion return time and time again and hence build his volume.

He stated that he was not aware that he was antagonizing Sunbeam by using our products for this purpose.....

-- it was pointed out that he, personally, was rather difficult to contact by our own representatives, but his senior people were well informed. We mentioned names such as Larry Krol and Mr. Jeffreys and perhaps others with whom our men had contact. He immediately suggested that he should call these people to his office, but he did not follow through.

-- As a result of further questioning, he did acknowledge that he was aware of Bill C58 becoming Law on August 1st and realized that this could affect his merchandising policy. For example, he stated that at a recent staff meeting, their Mr. Jeffreys had advised the group assembled that Bill C58 had become Law and that it would be wise that they should govern themselves accordingly since many national brand manufacturers could be in opposition to them using their products as loss-leader items. It was pointed out that the timing of these two recent ads seemed most peculiar. He was obviously selling well below cost immediately after the law had been passed, as though it was his desire to test the new legislation. He indicated that he had no desire to test the legislation. He did counter, however, with the thought that some time ago in Toronto a bylaw existed that prevented retail stores being open after certain hours. He felt that this law was basically unsound and after investigation as to the possible fines, they proceeded to stay open beyond the hours stipulated by the bylaw and paid fines B U T -- eventually the law was changed.

A general discussion took place with regard to the costs of retailing and it was suggested that his location, nature and volume of his advertising, his store staff and key people, represented comparatively normal retailing costs. He tended to belittle these comments with the suggestion that people on his floor were not sales people in any sense of the word - - - that there was no selling done inside Honest Ed's premises.

In a further discussion with regard to the theory of loss-leading, he did acknowledge that he was contributing nothing in the way of sales efforts to enhance the value or prestige of any brand name that he might be using, and did realize that dealers generally had done much in the way of aggressive action, demonstration, etc., to build prestige for these brand names. He did acknowledge that we had a point here and that he was capitalizing on the efforts of his contemporaries.

He indicated an ignorance of our immediate planning with regard to action under the new legislation, at which time we presented him with a complete copy of our dealer letter dated September 14th with price lists attached. It was suggested that he might review this at his convenience. He indicated that he would, and further, that he would contact us by telephone perhaps with regard to his reactions

and intentions."

(Serials 667-668)

When he appeared as a witness before the Commission Mr. E.A. Jeffreys, Vice-President of Honest Ed's, produced copies of the advertisements of August 13 and September 15, 1960, referred to in the Sunbeam memorandum of the interview on September 16, 1960 and also a copy of an advertisement of July 14, 1960. Mr. Jeffreys also produced a statement (Exhibit H-4) which gave particulars of the purchases and sales of Sunbeam steam irons by Honest Ed's in 1960. The table below recapitulates the particulars furnished by Mr. Jeffreys:

Table 1

Sales of Sunbeam Steam Irons (S-5) by Honest Ed's in 1960

	Jan. 13	Mar. 2	Advertisements			Dec. 16
			July 14	Aug. 13	Sept. 15	
Quantity Purchased	5	300				36
Invoice Price	\$15.02	\$12.64				\$15.02
Trade Discount	7½%	Net				5%
Net Unit Cost	\$13.89	\$12.64				\$14.27
Regular Selling Price	\$14.97	\$14.97				\$15.99
Mark-up on Selling Price	7.2%	15.6%				10.8%
Advertised Price	-	-	\$12.77	\$10.99	\$10.99	-
			Practically			
Mark-up on Advertised Price	-	-	Nil	Loss	Loss	-

Note: Approximately 250 steam irons were sold at advertised prices, the balance at Honest Ed's regular prices.

Source: Exhibit H-4.

Honest Ed's advertisements of the Sunbeam steam irons on August 13 and September 15 differed from the advertisement of July 14. The latter advertisement offered the Sunbeam iron at \$12.77 (Reg. 21.50) for sale on the following Friday and Saturday. The advertisement of August 13 offered the Sunbeam iron at \$10.99 (Reg. 21.50) among

"Door Crashing Specials" on Monday, August 15 - 6:30 p.m. The advertisement of September 15 also offered the Sunbeam steam iron at \$10.99 (Sug. List 21.50) among "Door Crashing Specials" on Friday, September 16 - 6:30 p.m.

During the hearing for the taking of evidence and also at the hearing before the Commission, Mr. Jeffreys was questioned about the occasions in 1960 when Honest Ed's had sold Sunbeam products at less than the cost of acquisition. On his first appearance Mr. Jeffreys testified that there had been only two instances of this kind from August to December 10, 1960 (Evidence, p. 47). Exhibit H-4, referred to above, shows two instances of the kind described although other evidence in the inquiry suggests that a product, other than the steam iron, was involved in one instance. However, the evidence before the Commission does not disclose any Sunbeam product, other than the steam iron, being sold by Honest Ed's at less than the cost of acquisition.

Mr. Jeffreys was also asked why Honest Ed's offered Sunbeam products at less than the cost of acquisition. His evidence on this point is not entirely clear and the explanations given differed on his two appearances. The main reason given by Mr. Jeffreys was that a competitor had offered similar merchandise at a price lower than that established by Honest Ed's and "whether it hurt us or not we just had to meet it" (Evidence, p. 47).

On his first appearance in the inquiry Mr. Jeffreys was questioned on the subject of the M.P.R.P. programme of Sunbeam and gave the following testimony:

"Q. Are you familiar with the prices which are known as the MPRP price list?

A. Yes.

Q. If Honest Ed's was to sell at the prices known as the MPRP prices would that result in a higher or a lower or an equal mark-up as compared with the prices which Honest Ed's normally sell at?

A. It would provide us with what is in our opinion an excessive mark-up, appreciably higher than we are satisfied with."

(Evidence, p. 21)

Another class of Sunbeam products handled by Honest Ed's was electric shavers. On September 29, 1960 Mr. J.C. Hall wrote the following memorandum to Mr. L.F. Fitzpatrick, Jr.:

"On September 27, 1960, Bill West reported to me that he had made a call on a John Schellsack* who is the shaver buyer at Honest Ed's. Bill had a talk with him regarding our minimum profitable resale prices insofar as shavers were concerned with the idea of trying to persuade Schellsack to put his prices on Sunbeam shavers up to the minimum profitable resale prices.

Schellsack told Bill that they had a manager's meeting and discussed the matter fully and it was felt by them that Sunbeam could not insist on them selling at prices equal or above the minimum profitable resale prices and that if they desired to sell any time at lower prices it was their privilege to do so.

Schellsack further suggested to Bill that he had placed orders on the Model 555 with Masco Electric in Toronto and that it was his intention to run an ad on the 555 as soon as he received delivery at a price of \$24.95.

Bill discussed advertising monies with him providing that they would run it at the minimum profitable resale price but there was little if any interest shown and Schellsack repeated his intentions to advertise the 555 at a \$24.95 price.

Bill further reported that he had actually seen a proof of an ad that Honest Ed intends to run in the very near future on the new Model Philishave Razor at a price of \$14.99. Bill was told that Honest Ed had bought three gross of Philishaves to use in this spectacular sale.

Bill further reported there was some consideration by Honest Ed given to taking Sunbeam completely off their shelves but no definite decision was reached on this point.

Bill also talked to Larry Croll the appliance and floor care buyer and was told by Larry Croll that it was their intention to stock the 620 Floor Conditioner but that they would have it priced at \$32.95 on their floor and that it was not their intention to advertise.

* John Soltyssek is buyer of shavers at Honest Ed's (Evidence, p. 51).

You and I discussed the possibility of talking to Masco and suggesting that they hold up deliveries on the 555 to Honest Ed as they were only going to receive twelve in the first shipment, however, your feeling was that we should not contact Masco and, therefore, nothing was done on this matter."

(Serials 677-678)

Mr. E.A. Jeffreys of Honest Ed's produced a copy of an advertisement of December 15, 1960 in which Honest Ed's offered Sunbeam Shavemaster at \$24.99 and showed a List Price of \$34.95 (Exhibit H-10). Mr. Jeffreys also filed with the Commission a statement giving particulars of the purchases and sales of Sunbeam Electric Shaver #555 by Honest Ed's during the latter part of 1960 (Exhibit H-9). The table which follows recapitulates the particulars given in this exhibit.

Table 2

Sales of Sunbeam Electric Shaver #555 by Honest Ed's in 1960

	Oct. 3	Nov. 10	Dec. 5	Advertise- ment Dec. 15	Dec. 16
Quantity Purchased	3	12	72		72
Invoice Price	\$22.63	\$24.47	\$24.47		\$23.25
Trade Discount	-	5%	5%		-
Net Unit Cost	\$22.63	\$23.25	\$23.25		\$23.25
Regular Selling Price	\$25.99	\$25.99	\$23.99(special)		\$25.99
Mark-up Selling Price	12.9%	10.5%	3.1%		10.5%
Advertised Price				\$24.99	
Mark-up on Advertised Price				7.0%	

Note: Approximately 50 shavers were sold by Honest Ed's at a price of \$24.99 and the balance at \$25.99.

Source: Exhibit H-9.

It will be noted from the above table that a special "in store" price of \$23.99 was established by Honest Ed's which was lower than the special advertised price of \$24.99. However, there is no evidence of how long the special "in store" price prevailed and the summary given by Mr. Jeffreys would indicate that sales were not made at the lower price.

The Sunbeam FPM Frypan was another product handled by Honest Ed's. Mr. Jeffreys produced a copy of an advertisement on July 19, 1960 in which Honest Ed's offered a Sunbeam frypan at \$13.97, Reg. 21.95 (Exhibit H-7) and a copy of an advertisement on December 6, 1960 in which the price for a similar article was \$14.99 (Exhibit H-8). Mr. Jeffreys also filed with the Commission a statement giving particulars of the purchases and sales of Sunbeam FPM Frypans in 1960 (Exhibit H-6). The following table relates the particulars given in Exhibit H-6 to the prices shown in the advertisements (Exhibits H-7 and H-8).

Table 3

Sales of Sunbeam FPM Frypans by Honest Ed's in 1960

		Advertise- ment July 19	Advertise- ment Sept. 15 24	Advertise- ment Dec. 6
Quantity Purchased	<u>Feb. 18</u> 140			
Invoice Price	\$15.37		\$15.37	
Trade Discount	7½%		5%	
Free Goods	12		-	
Net Unit Cost	\$13.09		\$14.60	
Regular Selling Price	\$15.97		\$18.97	
Mark-up on Selling Price	18.0%		23.0%	
Advertised Price		\$13.97		\$14.99
Mark-up on Advertised Price		6.3%		2.6%

Source: Exhibits H-6, H-7, H-8.

A note on Exhibit H-6 states that approximately 80 units were sold at the special advertised prices of \$13.97 and \$14.99 and the exhibit indicates that such sales were made from the 140 units purchased on February 18, 1960. On this basis the mark-up on the price advertised on December 6, 1960 is shown as 13 per cent rather than the much smaller margin shown in the above table when the advertised price is related to the cost of purchases made on September 15, 1960.

The evidence in the inquiry does not establish definitely that the particular advertisement of Honest Ed's on December 6, 1960 was related directly to contemporaneous action by Sunbeam although the offer of Sunbeam frypans at \$14.99 is referred to in the evidence in relation to such action. It may be noted that the advertisement of December 6, 1960 indicated that the frypan would be on sale the following day, December 7. Under date of December 6, 1960 Mr. L.F. Fitzpatrick, Jr. addressed the following letter to "All Sunbeam Distributors":

" 'Honest Ed's' of Toronto, Ontario, is advertising and selling Sunbeam products at prices which cause us to believe he is making a practice of using Sunbeam merchandise as loss-leaders, or not for the purpose of selling such merchandise at a profit but for the purpose of advertising or attracting customers to his store in the hope of selling them other articles.

You are hereby advised to refuse to sell or supply Sunbeam merchandise to 'Honest Ed's' of Toronto, Ontario, or to any other firm with whom Mr. Ed Mirvish is associated under whose name Sunbeam merchandise is being obtained by 'Honest Ed's'.

We understand that 'Honest Ed's' has obtained merchandise under one or more of the following names: Associated Houseware Distributors Limited, Mirvish Enterprises Limited, Davanne Holdings Limited."

(Serial 1395)

The principal supplier of Sunbeam products to Honest Ed's was Masco Electric Company Limited, a Sunbeam distributor in Toronto, sometimes referred to as Masco. On December 8, 1960 a meeting was held at the offices of Honest Ed's which was attended by representatives of Masco, officials of Honest Ed's and Honest Ed's solicitor and accountant. Mr. D.S. Rattray, President of Masco, gave the following evidence in regard to the meeting:

"A. Well, we immediately of course got in touch with the personnel in Honest Ed's including Mr. Mirvish and Mr. Jeffreys. We went over to see them to let them know that we had had this letter and explain our position and the embarrassment that we felt in this situation and point out to them that because of the inter-relations as between ourselves and Sunbeam and also what it meant as far as future association with them was concerned we felt we were no longer in a position to supply them with Sunbeam products."

(Evidence, p. 67)

The following is included in the evidence of Mr. Jeffreys in regard to the meeting:

" MR. MacINTOSH:

Q. I am sorry. On the occasion when you met with Masco on December 8th, 1960 did the officials of Masco show to you a particular case where Sunbeam alleged that you were selling below your cost?

A. Yes, they did.

Q. And at that time did you give Masco Electric an explanation of that sale?

A. Yes.

Q. And was that article acquired at the price which Masco believed it had been acquired at or was it a special price that you had negotiated?

A. It was a special purchase that we made at a price less than Masco would have been able to supply us and we passed that saving on to the public with the results that I believe Masco had been told by Sunbeam that we had actually loss-leadered where in fact we had not.

Q. But that particular product was sold at a price which was less than was its cost of that article from Masco?

A. That is correct, sir.

Q. Did Masco at that time tell you that a buyer had shopped for this article which he had obtained had borne a mark which indicated it came from the warehouse of Masco Electric?

A. That is correct.

Q. Were you able to give any explanation for that?

A. No, other than it was a mistake. It is very difficult in our quarters to make sure that everything is in its place and the explanation I gave was that this one particular carton which the Sunbeam test buyer selected was there simply by mistake. The rest of the cartons which were sold did not have this particular code number or identification on it. These are things which I am sure you gentlemen appreciate can happen in a business such as ours. It was a genuine mistake and Sunbeam happened to detect it and on those grounds they suggested we had been loss-leadering.

Q. Was that particular special put on for the purpose of advertising and of getting customers into your store or was that special put on for the purpose of making a profit on those goods?

A. It was put on for making a profit."

(Evidence, pp. 44-46)

The same situation is referred to in a letter of December 9, 1960 which Mr. E.A. Jeffreys wrote to Masco:

" We wish to confirm the information given to you during our meeting yesterday about the distribution of Sunbeam products and also to comment on the letter received by you from Sunbeam Coproration [sic] Canada Limited.

In that letter Mr. Fitzpatrick says that the prices used by us cause Sunbeam to believe that we are making a practice of using Sunbeam merchandise for loss-leaders and not for the purpose of selling such merchandise at a profit but for the purpose of advertising and attracting customers to the store in the hope of selling them other articles. Sunbeam have advised you to refuse to sell or supply Sunbeam merchandise to us or to any company from whom we might acquire such merchandise.

This letter is probably prompted by our failure to sell goods at the 'minimum profitable resale price' set out in the dealer price sheet issued by Sunbeam on September 15th, 1960. We understand Sunbeam are also concerned by our recent sale of Sunbeam fry pans at \$14.99 which they have advised you were products sold by your company.

As we told you yesterday, the products used in this sale were not products sold by your company but were products purchased from another company at an especially attractive bankrupt price. Some were sold at \$14.99 and the balance are presently being sold at \$15.97. At either price these fry pans were sold at a profit, so obviously the transactions cannot be described as loss-leadering.

You have told us that Sunbeam has advised you that one of the appliances used in the sale was sold to us by your company. It may be that one of these fry pans were sold to us by Masco and was used in this sale by mistake. This is merely a case of confusion in inventory as the quantity of fry pans which were sold during the sale were acquired at appreciably less than your usual price.

We have not sold Sunbeam products at the prices specified by them as the 'minimum profitable resale price' but we do not believe that this constitutes loss-leadering. The costs of a cash and carry operation such as ours differ entirely from the costs of other kinds of retailers which presumably Sunbeam used for determining its 'minimum profitable resale price'. The average operating costs of such retailers have no real bearing on the question of whether Honest Ed's is using goods for the purpose of making a profit on them or for the purpose of advertising. A normal margin for a retailer selling in small quantities is not a normal margin for a retailer selling in large quantities. Furthermore, we do not provide expensive premises for our customers, extensive parking facilities, deliveries, credit, telephone service, pick-ups and many other features which add to the cost of doing business of the ordinary retailer.

Our costs differ greatly from those of retailers who do provide such services. We have not made a practice of selling Sunbeam appliances at prices which do not yield us a profit and thus we do not think that you have any right under the law to refuse to make supplies available to us.

As we told you yesterday, we believe that if you follow the 'advice' given by Sunbeam you will be acting contrary to the provisions of section 34(3) of the Combines Investigation Act.

We also believe that the attempt by Sunbeam to have all dealers use their 'minimum profitable resale prices' is an attempt to induce dealers to resell Sunbeam products

at prices specified by Sunbeam or at prices not less than the minimum prices specified by Sunbeam. This too, in our opinion, is contrary to the legislation.

We told you yesterday that we had already instructed our auditors Messrs. Walton, Wagman & Co., Chartered Accountants, 62 Richmond St. West, Toronto, to make a study of the costs properly attributable to the sale of electrical appliances as well as other classes of goods. You agreed that it was obvious that no one cost factor could be applied to the sale of all of the varied merchandise handled by us. Each class of merchandise presents somewhat different problems of distribution and the costs applicable to each differ. We believe our present allocations of cost are sound. Nevertheless, we decided that we should obtain outside advice as to the appropriate cost factor for each class of merchandise in order that we may be sure our allocations are as realistic as possible. Of course, such a study involves very difficult problems as there is no one method of allocating costs as between different phases of a retailer's business.

When this advice has been received it is our intention to vary our prices, if any of them need varying, in order that we do not make a practice of selling goods as provided in section 34(5) (a) and (b) of the Combines Investigation Act.

In the light of these explanations we do not understand how you can have reasonable cause to believe that Honest Ed's has been making a practice of using Sunbeam products as loss-leaders or not for the purpose of selling these articles at a profit but for the purpose of attracting customers to the store. You could only come to this opinion by determining what our costs of selling these products is rather than accepting the standard set by Sunbeam on the basis of other people's costs.

We should appreciate it if you would consider your position again and discuss the question further with Sunbeam Corporation Canada Limited in order that your supplies of Sunbeam products and our supplies of Sunbeam products may be maintained."

(Exhibit S-5)

Mr. John J. MacIntyre, an employee in the sales department of Sunbeam, gave evidence to the Commission that he went to Honest Ed's on December 7, 1960 and purchased a Sunbeam frypan for \$14.99. He said that as he recalled there were from 15 to 20 frypans on sale at that time. His evidence included the following:

"Q. When you looked at these articles on Honest Ed's counter, or underneath it, could you identify the distributor from whom they came?

A. Yes, it was Masco Electric.

Q. How could you tell that?

A. It was stencilled on the end of the frypan carton.

Q. Is that stencilling put on by Sunbeam?

A. Yes, that is correct.

Q. And did that stencilling appear on all the cartons?

A. Yes, as I recall it, it did.

Q. Did you notice any special display of any other Sunbeam frypans?

A. No, no special displays.

Q. That is, other models?

A. That is right."

(Hearing, pp. 89-90)

The evidence in the inquiry does not establish what Sunbeam products were secured by Honest Ed's from sources other than Masco. The prices of \$14.99 and \$15.97, referred to in Mr. Jeffreys' letter of December 9, 1960, coincide with the prices shown for the sale of Sunbeam frypans supplied by Masco as listed in Exhibit H-6. Exhibit H-6 also shows that while the price of \$14.99 was close to the cost price of \$14.60 for frypans supplied by Masco to Honest Ed's in September 1960, it was not a sale below cost and if frypans from the earlier purchases in February, 1960 were still being sold by Honest Ed's in December a larger margin would be secured on the sale of older stock.

Mr. Rattray of Masco testified that during the month of December, 1960 there were several discussions between representatives of Masco and Honest Ed's. Masco also approached Sunbeam to see if

the latter would modify its attitude toward the supply of Sunbeam products to Honest Ed's. Mr. Rattray testified as follows:

"Q. And did you during the conversation by telephone with Mr. Fitzpatrick's superior ask him to reconsider the request or advise as it is put in the letter to cut off Honest Ed's?

A. Yes, the subject was definitely discussed.

Q. And what was his reaction?

A. His reaction was a definite no.

Q. Did he give you any reasons which are not contained in the letter of December 6th?

A. I will have to have a look at that letter again. No, this was their stand.

Q. Their basic proposition was that Honest Ed's was loss-leadering and this was the basis on which they wanted him cut off?

A. That is correct."

(Evidence, p. 74)

In his letter of December 9, 1960 to Masco, Mr. Jeffreys said that the auditors of Honest Ed's had been instructed to make a study of the costs of handling electrical products in the store. In a letter of February 17, 1961 Mr. Jeffreys informed Masco that the study had been completed. His letter contained the following:

" . . .

This involved assignment has been completed, and the report in our possession dated December 15, 1960, states that 'It is our opinion that your electrical appliance department is operating on a profitable basis'. This report is related to our fiscal year ended December 31, 1959, the last completed fiscal year for which audited financial statements are available.

We would ask you therefore to convey this information to both the Sunbeam Corporation and Canadian General Electric, and to this end we enclose additional copies of this letter.

It is hoped that as a result the Sunbeam Corporation may see fit to resume deliveries to us through your good selves."

(Exhibit S-8)

Mr. Rattray of Masco testified that although Masco ceased to supply Sunbeam products to Honest Ed's after the receipt of the Sunbeam letter of December 6, 1960, and after conversations with Sunbeam officials, Masco continued to supply other lines of merchandise to Honest Ed's. The following are extracts from his evidence:

" MR. WHEALY:

Q. You mentioned a couple of times in your evidence so far that you felt you were in a very difficult position with respect to Sunbeam or you felt embarrassed (I believe those were the words you used). In what regard or why would you be embarrassed?

A. Well, here again it is an area of judgment. The indications at least to me seemed reasonably clear that to say the least Sunbeam would view with disfavour our continuing to supply Sunbeam products to Honest Ed's which might or might not have resulted in complicating our business association with them and inasmuch as Honest Ed's was (I use the term loosely) one of our customers, although probably our most important customer nevertheless Sunbeam products were almost essential to the type of business we had in Masco for the wide range of customers we have in this area. It was vital and certainly of paramount importance to us that we have the Sunbeam products line and in view of the nature of this letter I felt that we might be jeopardizing our association with them were we to continue selling Honest Ed's.

Q. At any time did Sunbeam say to you that if you continued to sell Honest Ed's that they would regard this as grounds for ceasing to supply you or regarding you as a distributor of Sunbeam products?

A. No.

Q. Did they at any time give you the strong impression that such would be the result?

A. Well, I could not help but form the opinion that we were incurring a grave risk with respect to our future relations with Sunbeam if we were to carry on selling Associated Hardwares or Honest Ed's as the case may be.

Q. On what basis did you form this opinion?
What are the characteristics that gave you this impression?

A. Well, as a result of conversations with officials of Sunbeam.

. . .

Q. You mentioned earlier that you gained this impression of the consequences which would follow if you did not follow Sunbeam's advice and that you gained this impression from talks with officials at Sunbeam?

A. That is correct.

Q. Who were the officials involved?

A. Well, Mr. Fitzpatrick is one and I must confess I have forgotten the name of the other gentleman. He is either president or executive vice president of the Canadian operation. I have only had the one conversation with him and it was over the telephone. I never met him. He had been Mr. Fitzpatrick's immediate superior."

(Evidence, pp. 69-71)

"Q. When was this impression first created in your mind that you would be putting your Sunbeam distributorship in jeopardy?

A. Well, the first indication followed immediately upon receipt of the letter. Again the suggestions were, at least in my interpretation, reasonably clear that we had been issued an order not to do something and if we persisted in that course we did it with all the consequences that might follow. As far as we were concerned the consequences might involve the loss of the Sunbeam distributorship. This was an opinion that we arrived at.

Q. You regarded then this letter of December 6th which is Exhibit S-7 as an order, did you?

A. Well, nobody --

Q. I am asking you how you regarded it?

A. Not as an order, no, because we do not operate our business on the basis that a supplier can give us an order. They can certainly give us a strong indication of what they would prefer us to do or prefer us not to do and it is then up to us to exercise our own judgment as to whether or not we are willing to abide by their suggestion but I would not take it as an order."

(Evidence, pp. 72-73)

"Q. Prior to the meeting then early in December 1960 had you ever considered whether or not Honest Ed's was loss-leadering Sunbeam products? Had you ever given such a thought to the matter?

A. We had not considered it, I had not considered it.

Q. Were you aware of whether or not other senior officials of Masco had considered it?

A. I would as a matter of opinion think that we had not considered it.

Q. Well, are you aware of it?

A. No, I am not aware of it."

(Evidence, pp. 67-68)

"Q. And subsequent to this conversation in which you indicated you would be unable to supply any further Sunbeam products have you carried on selling them other products?

A. Yes, we have.

Q. So that this meeting was solely concerned with the supply of Sunbeam products, it did not affect your business relations with regard to other products?

A. That is correct."

(Evidence, pp. 68-69)

"Q. Were it not for the objections of Sunbeam would Masco be quite willing to continue supplying Sunbeam products to Honest Ed's?

A. I think the answer to that question must be yes."

(Evidence, p. 78)

CHAPTER VI

DEALER AND DISTRIBUTOR COST SURVEYS MADE BY SUNBEAM

The Statement of Evidence contains a review of the evidence obtained in the inquiry relating to certain surveys made by or on behalf of Sunbeam of the operating expenses and certain other financial aspects of the operations of electrical appliance retailers and distributors. Although the evidence was presented in the Statement of Evidence the Director took the following position with respect to such evidence:

"Since the allegations relating to the pricing policy of Sunbeam in its M.P.R.P. in Chapter VI are concerned only with section 34(2) of the Combines Investigation Act, it will be submitted in argument that the defences provided in section 34(5) are not applicable and, therefore, that the evidence which follows in this Chapter in so far as it may relate to such defences is not relevant. It will be further submitted that such evidence is relevant if at all only in determining whether or not the evidence establishes the allegations under section 34(2), and it will be further submitted that even if such evidence is not relevant for that purpose, other evidence in the inquiry clearly establishes the allegations under section 34(2)."

(Statement of Evidence, para. 100, p. 57)

Counsel for Sunbeam took much the same position as the Director in regard to the relevance of the cost survey evidence to the allegations although he took issue with any suggestion that the evidence of the surveys could add any support to the allegations of the Director under section 34(2). Counsel for Sunbeam considered that the Commission could disregard the evidence of the surveys as presented in the Statement of Evidence as not being relevant to the allegations of the Director. On this point Mr. Clarry said in argument:

"So, in summarizing the position under chapter V, [Survey Information] I say that the whole chapter can be completely disregarded, since there is nothing in it, in my submission, which is relevant to establishing the allegation under section 34(2)."

(Hearing, p. 202)

In view of the position taken by counsel for Sunbeam and the reasons of the Director for presenting the survey information in the Statement of Evidence, the Commission does not consider it necessary to give a detailed review of this material or of evidence relating to the same matter called by Sunbeam at the hearing.

It should be borne in mind that the information as to dealers' and distributors' gross margins, operating expenses and profits was secured by Sunbeam after the introduction of the M.P.R.P. programme in September, 1960 and, consequently, such information played no part in the preparation of the programme.

In a letter of September 21, 1960 to those Sunbeam dealers from whom financial information was being sought, Mr. L.F. Fitzpatrick, Jr. gave the following explanation of the purpose of the survey:

"Dear Sunbeam Dealer:

In our letter of September 14 our plans were outlined to eliminate 'loss-leading' of Sunbeam Appliances. Many of you have asked for help in restoring orderly marketing of Sunbeam products which will enable you to realize a reasonable profit on the sale of our products. Due to the recent legislation we are now in a position to help you -- but we need your assistance.

We have arranged with Peat, Marwick, Mitchell & Co., Chartered Accountants, who are mailing this letter on our behalf, to conduct a national survey of our better retailers. The purpose of the survey is to accumulate information concerning costs of doing business. With this information we can defend our position with any retailer to whom we have refused supply of Sunbeam products because we had reason to believe he was using our merchandise as loss-leaders.

We know you realize that all of the facts you provide to our auditors will be used in your best interest. Your prompt co-operation will be appreciated."

(Serial 653)

Questionnaires were sent on behalf of Sunbeam to 288 or 289 dealers in 27 Canadian cities and by October, 1960 replies had been made by 43 retailers of whom 20 were electrical appliance dealers and 10 were hardware dealers. As far as the evidence indicates the information furnished related to the overall operations of the store and not to the distribution of Sunbeam products in particular.

Sunbeam also sought financial information from some of its wholesale distributors. The purpose of the survey was described in a letter of October 5, 1960 from Mr. L.F. Fitzpatrick, Jr. to the distributors solicited.

"In our letter of September 1, 1960 to our Distributors, and our letter of September 14, 1960 to our Dearlers [sic], our plans were outlined to eliminate 'loss-leading' of Sunbeam appliances.

Many of our Distributors have asked for help in restoring orderly marketing of Sunbeam products which will enable you to realize a reasonable profit on the sale of our products. Due to recent legislation we are now in a position to help you -- but we need your assistance.

To defend our position, it is vital that we have more information concerning the various costs of doing business at wholesale. We therefore, ask you to complete the attached 'Condensed Operating Statement For the Most Recently Completed Year End'.

The form provides that you may report in dollars, which we prefer, or in percentage if you wish. Please report for your total business in section (1) and, if your regular accounting provides a departmental breakdown, report in section (2) the department figures that include electrical appliances.

We assure you that all of the facts you provide to us will be held in strict confidence to be used in your best interests. Your prompt co-operation will be appreciated."

(Serial 965)

The questionnaire enclosed with the letter of October 5 requested dollar amounts or percentage figures in relation to sales for gross profit, total operating expenses and net profit before income taxes. The evidence indicates that questionnaires were sent to 82 Sunbeam distributors and that 47 furnished information in reply.

Sunbeam called as a witness before the Commission, Mr. Edwin B. Chown, an executive partner of Woods, Gordon & Co., management consultants. Mr. Chown's evidence dealt in the main with available information as to operating expenses, gross margins and profits of discount stores and other types of retail and wholesale establishments in the United States and Canada. In view of the position taken by counsel for Sunbeam, as described earlier in this section, and the allegations made by the Director, the evidence of Mr. Chown is not

regarded as being relevant to the latter and the Commission does not consider it necessary, for the purposes of the present inquiry, to include in this report a report of figures and explanations presented by Mr. Chown.

CHAPTER VII

CONCLUSIONS

It has been stressed on several occasions earlier in this report that the allegations made by the Director relate only to the question whether the "Minimum Profitable Resale Price" programme constituted resale price maintenance on the part of Sunbeam by requiring or inducing or attempting to require or induce distributors and retailers to resell Sunbeam products at prices not less than minimum prices specified by Sunbeam or at a discount not greater than a maximum discount specified by Sunbeam.

The adoption of the "Minimum Profitable Resale Price" programme by Sunbeam in September, 1960 was contingent, as indicated in the position taken by the company, on the passage of legislation in August, 1960 amending section 34 of the Combines Investigation Act which deals with the practice of resale price maintenance. The amendment, subsection (5) of section 34, provides certain defences for a person charged with refusing or counselling the refusal to sell or supply an article. The attitude of Sunbeam was stated at one point in the argument of counsel for the company as follows:

"MR. CLARRY:

. . .

We wish to make it clear that Sunbeam always has recognized that it is governed by the provisions of section 34 of the Act, and it is only to the extent that section 34 permits them to do something that they can get any protection. But we do submit that we do not need to make any apology for the position Sunbeam has taken. It was a statutory provision for which they had struggled. Whether or not they did right or wrong is a legal matter, and perhaps their conduct has to be assessed. But their approach to it, that they were going, to the extent they could, to take advantage of subsection (5) is, I submit, completely proper.

They had struggled for this remedy, and it would have been pointless for them not to take advantage of the limited protection that the legislature had given them."

(Hearing, p. 144)

Section 34(5) provides that where a person is prosecuted under the section he has a good defence against proof that he took action to secure the withholding of supplies from any other person if he and any one upon whose report he depended had reasonable cause to believe and did believe that that other person was engaging in any one of four practices described in the subsection. Two of these practices relate to misleading advertising and the failure to provide services. The others involve using articles for purposes other than making a profit. One of these defines the practice of using articles as loss-leaders as making use of the articles "not for the purpose of making a profit thereon but for purposes of advertising". The other is closely related and consists in the practice of using articles "not for the purpose of selling such articles at a profit but for the purpose of attracting customers to his store in the hope of selling them other articles".

It will be noted that section 34(5) may be relied upon only when a practice is made of using articles of a supplier in one or more of the four types of situation defined in the legislation. Just what would constitute a practice would, of course, be a matter for determination in the particular circumstances, but it is clear that Parliament did not intend that random or isolated sales or offers to sell should be so regarded.

In addition, the person from whom it is sought to withhold supplies must be believed to be offering such articles not for the purpose of making a profit in selling them but for advertising or as what might be termed a "bait" to attract customers to his store. The essential condition in both situations is that the vendor is not endeavouring to secure a profit on the articles in question.

In informing its dealers of the "Minimum Profitable Resale Price" programme Sunbeam stated its opinion of what would be "loss-leading" its products in the following terms:

"It is our opinion that a person loss-leads our products when he sells them at a gross margin less than his average cost of doing business plus a reasonable profit."

(Serial 642)

The foregoing definition by Sunbeam makes no reference to the purpose of the vendor which is an essential feature of the definitions contained in section 34(5) and attempts to establish a measure in terms of gross margin to determine what in its opinion would constitute "loss-leading" its products. While such a measure does not conform to the conditions set out in section 34(5) it also appears to lack any logical basis in terms of merchandising practice as a means of determining whether a merchant is endeavouring to market goods at a profit. It will be noted that Sunbeam established as one factor the "average cost of doing business". It is obvious that if there is an average cost there must be a range of costs for different products handled and for different departments of the business, as otherwise it would be impossible to arrive at an average cost. It appears to the Commission that whether the distribution of Sunbeam products would involve costs above or below the average could not be determined without accurate knowledge of the way in which a particular dealer was dealing in Sunbeam products and could not be judged on the basis of average costs. It also appears to the Commission that the basis on which a particular dealer could profitably handle Sunbeam products might well vary from time to time depending on the scale on which such products were handled, the manner in which they were stocked or retailed and other factors which might affect the cost of distribution.

The second factor which Sunbeam included in the definition of "loss-leading" was the obtaining of a reasonable profit. No measure was suggested for this factor and clearly none could be suggested because the securing of a profit is the result of successful marketing. A merchant might mark-up all his goods at his previous average cost of doing business plus an addition for profit and still operate at a loss if his turnover was not great enough to bring in sufficient revenue to meet his costs and provide a profit. The relationship between margins and turnover was succinctly stated in a recent article in Fortune as follows:

" Department stores have also been hampered by outmoded methods of management - in particular, their practice of offering the same package of services with every item and marking everything up by the same percentage, regardless of the costs incurred or the elasticity of consumer demand. 'Retailing', as Theodore Schlesinger, president of Allied Stores, puts it, 'has been captive to the percentage markup'. Department-store executives forgot that markup is only a means to an end - that what counts is return on investment; which is a product of turnover as well as markup." ¹

1 Silberman, Charles E. "The Department Stores Are Waking Up". Fortune, July 1962, p. 145.

In the case of its distributors, Sunbeam did not refer to the average cost of doing business in indicating what might be regarded as a profitable basis on which to handle its products but stated that it had satisfied itself that a distributor could not make a profit on the sale of Sunbeam products if he sold such goods at less than the prices suggested by Sunbeam for various quantities specified. This approach took no account of the conditions set out in section 34(5) which make the purpose of the vendor an essential factor leading to a belief that goods are being used as loss-leaders.

It is clear from the foregoing analysis that in its "Minimum Profitable Resale Price" programme Sunbeam adopted a definition of "loss-leading" which would serve its own purposes and which did not conform to the statutory definition of the use of an article as a "loss-leader". It is also clear that one of the features of the Sunbeam programme was the establishment of floor prices for distributors at the wholesale stage of distribution and for dealers at the retail stage. It is implicit in the "Minimum Profitable Resale Price" programme that Sunbeam would endeavour to secure the observance of the floor prices specified by it. The question raised in this inquiry is whether such endeavours by Sunbeam constituted inducing or attempting to induce other persons to resell Sunbeam products at prices not less than those specified by the supplier.

We may consider first the evidence relating to the floor prices which Sunbeam established for wholesale distributors of Sunbeam products. It will be recalled that when the "Minimum Profitable Resale Price" programme was adopted representatives of Sunbeam held meetings with Sunbeam distributors in a number of centres from Quebec City westward. The evidence relating to these meetings, in the opinion of the Commission, shows beyond any doubt that Sunbeam endeavoured to induce its distributors to sell Sunbeam products at prices not less than it specified on sales to dealers. There is also evidence which shows that on some occasions Sunbeam representatives were satisfied that distributors had agreed to maintain the specified prices. Referring to the meetings with distributors, Mr. E.F. Bond, Executive Vice-President of Sunbeam, wrote to the President of the Sunbeam Corporation in the United States, in a letter quoted previously, that Sunbeam would:

" . . . Establish maximum discounts allowed by distributors for quantity purchases by dealers. . . ."

(Serial 637)

The language used by Mr. Bond can only be interpreted as establishing an actual floor price rather than a suggested price. The manner in which the programme was presented to Sunbeam distributors leaves no doubt that this was the interpretation given to the prices established for distributors when selling Sunbeam products to dealers. The following comments are contained in a memorandum prepared by a Sunbeam representative, which has been cited previously, in regard to a meeting held in Quebec City:

" . . .

- 2) It was unanimously agreed that new discount policy was to take effect immediately, but that orders being shipped till 5 o'clock p.m. of said day could be allowed whatever discount the goods were sold at, but no orders would be taken and given former discounts.
- 3) During the discussion the following points were raised:
by R. Turcotte of Jos. Cote Ltd.: 'Hidden discounts'
'Ways and means
to allow more
than 5%'

. . ."

(Serial 886)

In a report of a discussion with a distributor in Quebec Province Mr. J.C. Hall, Assistant General Sales Manager of Sunbeam wrote:

" . . . They, too, were in accord with the plan and agreed that as of that moment they would no longer offer any more than our suggested discount schedule. . . ."

(Serial 884)

The memorandum from which the foregoing extract is taken is set out in full earlier in this report.

That one of the results of establishing maximum discounts at which distributors could sell Sunbeam products to dealers would be uniform prices is shown in another portion of the letter of Mr. Bond, referred to above, in which he wrote:

" . . . Since we will know the costs at which all retailers will buy Sunbeam merchandise it is easy for us to determine their gross margin. . . ."

(Serial 638)

The evidence in the inquiry shows clearly that Sunbeam made persistent and widespread efforts to persuade retail dealers whose selling prices were lower than the "Minimum Profitable Resale Price" to raise their prices up to or above that level. Handwritten notes found in the office of Mr. J.C. Hall, Assistant General Sales Manager, attached to other documents relating to distributor meetings and which have been referred to in an earlier chapter dealing with such meetings, indicate some ways in which Sunbeam intended to apply the "Minimum Profitable Resale Price" programme. One portion of these notes reads:

" . . .

We will refuse deliveries to
Distr.
Dept store
and we will insist that you
discontinue deliveries
to any dealer
who is selling Sunbeam
below our
Minimum Profitable Resale Price.

. . ."

(Serial 943)

The instructions given by Sunbeam to its representatives and the actions taken by such representatives also make clear that the policy of the company was to persuade dealers to regard the "Minimum Profitable Resale Price" as the minimum price at which to sell Sunbeam products. In a letter to a Sunbeam salesman in British Columbia, which is quoted more fully earlier in this report, Mr. J.C. Hall, Assistant General Sales Manager, suggested in regard to a particular retail dealer that the Sunbeam representative "try every means you can to get him to raise his prices to our minimum profitable resale prices," (Serial 761).

Instructions to Sunbeam salesmen issued by the company on October 6, 1960, which have already been referred to in this report, included the following:

" . . .

Persuade every dealer to get his prices both 'In Store' and advertised up to or above Sunbeam's 'Minimum Profitable Resale Price' - This is your job, it's got to be done and done fast.

. . . "

(Serial 873)

Although correspondence between Sunbeam personnel indicates that the company had some hesitation in dealing with "in store" pricing of Sunbeam products it proceeded to attempt to persuade dealers to increase such prices when they were lower than the "Minimum Profitable Resale Price" level. In a letter quoted in an earlier chapter Mr. J. C. Hall gave the following advice to a company salesman:

" . . .

Legally, Bill, we can do absolutely nothing on 'in store' prices other than work our hardest to persuade dealers to bring their 'in store' prices up to at least our M.P.R.P. prices, "

(Serial 874)

Similar directions were given by Mr. Hall to a Sunbeam representative in Montreal in a letter which has been more fully quoted in a previous chapter of this report:

" . . .

It is our opinion, Bob, that you must do everything possible to persuade Faucher that his 'in store' prices must come up to our 'minimum profitable resale prices'.

. . . "

(Serial 1198)

The purpose of having the "Minimum Profitable Resale Price" programme provide a floor for prices of Sunbeam products is also indicated in this letter in which Mr. Hall wrote:

" He can be assured, if he will go up in price, that no one will be underselling him. . . . "

(Serial 1198)

The Commission concludes that the "Minimum Profitable Resale Price" programme which Sunbeam introduced in September, 1960 must be construed as an attempt at resale price maintenance on the part of Sunbeam with respect to wholesale distributors and retail dealers handling Sunbeam products. Sunbeam thereby engaged in the practice of resale price maintenance which is not permitted under section 34 of the Combines Investigation Act. The Commission recommends that a court order be sought under the provisions of the Combines Investigation Act to restrain Sunbeam from engaging in the practice of resale price maintenance in the manner disclosed in the present inquiry or in any other manner which would be contrary to public policy with respect to the maintenance of resale prices.

(Sgd.) C.R. Smith

Chairman

(Sgd.) A.S. Whiteley

Member

(Sgd.) Pierre Carignan

Member

O t t a w a,

October 4, 1962.

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